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# PRACTICING LAW INSTITUTE

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## LECTURE

Assembly Room of the New York County Lawyers'  
Association, 14 Vesey Street, New York City.

FRIDAY, NOVEMBER 17, 1944

*on*

### COPYRIGHT LEGISLATION:

- A. England
- B. United States
- C. France

*by*

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OUTLINE OF LECTURE;

EXPLANATORY NOTES, DISCUSSIONS, REFERENCES.



New York  
State Library  
Albany

# LECTURE: COPYRIGHT LEGISLATION

## A. England

### OUTLINE OF LECTURE

#### Explanatory Notes, Discussions, References

#### 1. Early litigation in Copyright—St. Finnian vs. Saint Columba (560 A. D.)

This incident is often cited; it has been mentioned as folk-lore of Copyright. St. Columba was an Irish Saint, a profound scholar, a skilled Copyist and illuminator. He copied without permission an Ancient Latin Psalter of great value, owned by his former teacher St. Finnian. Dermot the High King of Tara (Ireland) rendered a decision against St. Columba saying:

"To every cow its calf, to every book its copy"

The facts show that a copyright problem was not involved—no claim was made that St. Finnian wrote, revised or compiled the Psalter.

See

Copyright, its History and its Law by Richard Rogers Bowker (New York 1912) p. 9

Books and their Makers in the Middle Ages by George Haven Putnam (New York 1896)

The Author Vol. 49 No. 4, 1939 p. 138

The Question of Copyright by George Haven Putnam (New York, 1891)

#### 2. The Invention of the Printing Press; Its effect on English History and English Literature.

Cardinal Wolsey, with prophetic vision, warned Henry VIII to be cautious how he encouraged printing since it might be dangerous to the State.

(a) The Copyists, Illuminators and Lymers were displaced by monopolies of Book Publishers, Sellers and Printers.

(b) It spread information and enlightenment; it spurred changes in Religion, Government and Education.

**3. The great controversies that led to the Government control of speech, printing and literature and eventually to Copyright and its regulation (1485-1709).**

(a) The struggle between the King and Rome, the unbelievable power of the Interdiction, the Papal Bull of Deposition and Excommunication, Henry IV of Germany and Canossa; John of England and Pope Innocent III. The statute of Praemunire (16 Richard II Chapter 5) (forwarned) was passed in 1393.

It was first put on the books during the reign of Edward III in 1353 and again in 1365. It appeared in its final and most effective form in 1393 during the reign of Richard II.

Edward III reigned from 1327 to 1377; Richard II reigned from 1377 to 1399 and he was deposed by Henry IV with the approval of Parliament.

The law was one of the effective weapons which the King of England used to shake off the hand of the Pope. This law made it a grave crime to bring into England any Bull or letter of Excommunication from the Pope, without the consent of the King. It was under this statute that Henry VIII brought Wolsey's career to an end. Wolsey was on his way to London to suffer the death penalty when he was taken sick at Windsor and died.

However Henry VIII had other ways of thwarting the Pope. Fisher, the Bishop of Rochester, a priest of venerable years and character was kept for years in the Tower in misery. When the Pope learned of his fortitude, he created him a Cardinal. When the King heard that the Cardinal's Hat was coming from Rome he became enraged and shouted:



"He shall wear it on his shoulders, then, for I will leave him never a head to set it on."

Fisher was beheaded in 1535. Henry VIII ended the Power of Rome in England in 1529.

Rome's power was revived under Mary for 5 years (1553-1558); and again under James II for a few years (1685-1689).

(b) The struggle between the Kings and Parliament for Power.

With the single exception of Oliver Cromwell, from King John over the Magna Carta in 1215 to the forced "Voluntary" resignation of Edward VIII and his exile in 1936 it has been an unequal or one sided contest.

(c) The Religious Controversy.

Severance of ties with Rome; The Control of the Government and the Church by the Anglican Hierarchy—The suppression by the Anglican Church of all other forms of religion—Catholic, Quakers, and the various sects of the Protestants.

The Religious Persecutions, were ineffectual. The temper of the people remained unchanged. Maitland in his Essays on the Reformation challenged them:

"Our King has destroyed the Pope but not popery. He has expelled all the monks and nuns, pulled down their monasteries; he has caused all their possessions to be transferred into his Exchequer and yet they are bound, even the fragile female sex, to perpetual chastity. The impious Mass, the most shameful celibacy of the Clergy, the invocation of saints, auricular confession, substantiation, abstinence from meat, and purgatory were never held by the people in greater esteem than at the moment."

The persecutions sent the Quakers to Pennsylvania; the Puritans to Plymouth Rock and the Catholics to Maryland.



Libelous, ribald, scandalous and obscene books. Pamphlets, ballads and songs flooded the country forcing the government to regulate printing.

**4. The devices employed to control the press and printing.**

(a) *The Star Chamber (Custos Morum—guardian of the manners and morals of the realm) the most famous court in the English speaking world.*

The origin of the court is the subject of much discussion. It is claimed that it had existence prior to the Statute 3 Henry VII, chapter 1 (1488-1489). The Statute fixed the members of the court as:

1. The Chancellor.
2. The Treasurer of England.
3. The Keeper of the King's Privy Seal.
4. A Bishop.
5. A Temporal Lord of the King's Council.
6. Lord Chief Justice of the King's Bench.
7. Lord Chief Justice of the Court of Common Pleas.

Lord Andover in the House of Lords in 1640 said the statute of 3 Henry VII was the infancy of the Star Chamber; it was raised to Man's Estate by Cardinal Wolsey 8 Henry VIII (1517).

"From whence (being now altogether unlimited) it has grown a monster and will hourly produce worse effects unless it be reduced by that hand (Parliament) that laid the foundation."

A favorable commentator said:

"The Court is replenished with Dukes, Marquesses, Earls, Barons also with revered Archbishops and Prelates, grave Councillors of State,



learned Judges, such a composition for Justice, religion and government as may be well and truly said (whilst so great a presence kept with their bounds) Mercy and truth were met together”

Number of members of the Court:

Under Henry VII (1485-1509) 40.

Under Henry VIII (1509-1547) 40.

Under Queen Elizabeth (1558-1603) 30.

Under Charles I (1625-1649) 24 to 26.

The court served:

“to bridle such stout noblemen and gentlemen who would offer wrong by force to any meaner man and cannot be content to demand and defend the right by order of law.”

It dealt with high persons that the ordinary legal process could not reach. It had power to call defendants before them and to punish them as if convicted according to law. It added to the list of common law crimes which were before unknown or little considered. The King's Bench adopted the Star Chamber tradition. Nothing escaped its power.

The jurisdiction of the court was greatly extended by Henry VIII and its exercise of criminal jurisdiction rendered it a most odious institution under the succeeding monarchs.

The court rendered severe corporal punishment:

“It is painful even to repeat the cases of the rack, whipping of women, pillory, cutting off of ears, slitting of noses, branding with a hot iron and other cruelties inflicted by the Right Reyd. and Right Honble. Dignitaries who composed the Court of the Star Chamber.”

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“When once this Court began to swell big, and was delighted with blood, which sprung out of the



ears and shoulders of the punished, and nothing would satisfy the revenge of some clergymen, but cropt ears, slit noses, branded faces, whipt backs, gag'd mouths, and with all to be thrown into dungeons, and some to be banished."

It issued Decrees on the Regulation of Printing. Among the principal Decrees are:

**1. June 23, 1585. Every book is to be licensed**

"nor shall any one print any book, work or copy, against the form or meaning of any restraint contained in any statute or laws of this realm, or in any injunction made by her majesty or her privy council; or against the true intent and meaning of any letters patent, commissions or prohibitions under the great seal; or contrary to any allowed ordinance set down for the good government of the Stationers Company."

**2. July 11, 1637, the Court of Star Chamber made a decree limiting the number of the founders of letters for printing to serve the whole Kingdom to four, it codified its laws.**

1639 the storm began against the Star Chamber. Archbishop of London was sent to the Tower; Lord Chancellor Finch fled; Wren, the Bishop of Ely, imprisoned; Sir Francis Winderbank, Secretary of State, was impeached; he fled to Calais. It was abolished by 17 Car I Chapter 10, effective August 1, 1641.

See:

*Star Chamber Cases.*

Showing What Causes Properly Belong to the Cognizance of That Court, Reprinted from the Edition of 1630 or 1641. Boston, 1881.

*Collectanea Juridica.*

Consisting of tracts relative to the Law and Statutes of England—2 Volumes, London, 1791. The activities of the Star Chamber proceedings.



*The Star Chamber.*

Notices of the court and the proceedings with a few additional notes of the High Commission. By John Southerden Burn. London, 1870.

The following cases have a complete review of the activities of the Star Chamber and Stationer's Company:

- (a) *Tonson v. Collins*  
(1760) 1 W. Blackstone 301, 321
- (b) *Millar v. Taylor*  
(1769) 4 Burrows 2303
- (c) *Donaldson v. Beckett*  
(1774) 2 Brown's Cases in Parliament 129.

(b) *Court of High Commission.*

Established by Queen Elizabeth in 1559 (1 Elizabeth Chap. 1) For purpose of correcting errors, heresies, schisms, abuses, offences, contempts and enormities.

Infrequently invoked; it was employed chiefly against the Anabaptists (Unitarians). These "wretches abhorred in the eyes of all orthodox Anglicans" were tried and burned under the Writs of this Court; the last execution took place in 1612.

The Court held its last session in October, 1640; it was abolished with the Star Chamber by the Long Parliament in 1640, effective August 1, 1641. James II revived it, but its life was short.

See 17 Car. I Chap. 10.

- (c) "*The Bloody Assizes*"  
(July 11, 1685—September 7, 1685.)

The Protestant Duke of Monmouth contested the right of James II to the throne—after Monmouth's defeat and execution, James II desired revenge against the followers of Monmouth and his pamphleteers and libelous writers



and publishers; to vindicate Justice and Literature he devised the *Bloody Assizes*—a commission was appointed July 8, 1685, consisting of:

Jeffreys, Lord Chief Justice of the King's Bench,  
Chairman;

Chief Baron Montague	}	of the Court of Common Pleas
Justice Leving		
Justice Wythens		
Baron Wright		

Speaking of Lord Jeffreys, Macaulay said (*History of England*, Vol. I, 470, Vol. II, 120):

"The depravity of this man has passed into proverb."

and that James II selected Jeffreys to do the work

"which could be trusted to no man who revered law or was sensible to shame."

He made him Chief Justice of the King's Bench and later Lord Chancellor.

James II stated that Lord Jeffreys had:

"no learning, no sense, no manners and more impudence than ten carted street-walkers."

Macaulay related that

"Jeffreys accompanied by four other judges, set out on that Circuit of which the memory will last as long as our race and language."

He opened the Commission at Winchester, then went to Hampshire, Dorchester. He boasted that he had hanged more traitors than all his predecessors together since the Norman conquest.

In 4 or 5 weeks, the "*Bloody Assizes*" Court decreed the death of 331 persons, the transportation of 849; 33 were fined or whipped—all for the vindication of Justice, and the purity of Literature.



The executions until this day have left their memories.

Corpses were cut in quarters and then dropped in cauldrons of pitch and later on carried away and hung in appropriate localities as warnings.

An eye witness reported:

"Some places quite depopulated and nothing to be seen in 'em but forsaken walls, unlucky gibbets and ghostly carcases. The trees were loaden almost as thick with quarters as leaves; the houses and stables covered as close with heads as at other times with crows or ravens. Nothing could be liker hell than all those parts; nothing so like the devil as he. Caldrons hissing, carcases boyling, pitch and tar sparkling and glowing, bloody limbs boyling and tearing and mangling and he the great director (Lord Jeffreys) of it all."

When James II was deposed Lord Jeffreys, to escape the wrath of the mob, had himself committed to the Tower. He died there April 18, 1689.

See: *The Bloody Assizes* by Sir Edward Parry (New York) (1929)

(d) *The Company of Stationers'.*

The Stationers' Company traces its origin back to 1403. Before the existence of the Company, there was a voluntary and informal association or brotherhood of printers, bookbinders and publishers formed on the usual model of a city company. There was also a Society of Manuscript Producers (text writers); the text writers received authority to organize July 12, 1403 (4 Henry IV).

A record of these manuscripts and their proprietors was kept by the Clerk of the Society in what was styled "The Hall Book" and from this private regulation sprung the requirement for registration and deposit of copyrighted works.

On May 4, 1556 Queen Mary granted the Society a charter (3 and 4 Philip and Mary). The charter states:



"That we considering and manifestly perceiving that several seditious and heretical books, both in verse and prose, are daily published, stamped and printed, by divers scandalous, schismatical and heretical persons, not only exciting our subjects and liegemen to sedition and disobedience against us, our crown, and dignity, but also to the renewal and propagating very great and detestable heresies against the faith and sound Catholic doctrine of holy mother the church; and being willing to provide a proper remedy in this case" . . .

The grant was to 97 faithful liegemen who were free-men of the mystery or art of a stationer of London. Thomas Dockwray was the Master of the Stationers and the other 96 persons mentioned were incorporated into a Society and the Society was empowered to make ordinances, provisions and regulations for the conduct of the business; these could not be contrary to the laws or statutes of England or in prejudice to the commonweal of the English Kingdom.

1. No person was allowed to practice or exercise any of the arts of printing or stamping unless he was a member of the Society.
2. The Society was given the power to search for books or things printed and could seize the books and burn them or convert them to the use of the Society which were printed or stamped contrary to the law.
3. The wardens of the Society were empowered to imprison any person violating the law relating to the printing of books for a period of three months and "there remain without bail or main-prize" and in addition fined 100 shillings, one moiety to the Society and the other moiety to the Queen.

The charter was granted with the object of controlling the press and creating a powerful engine for the repression of literature distasteful to the court and ecclesiastical authorities.



November 10, 1559. Queen Elizabeth confirmed the charter.

The Stationers consisted for the most part of a few large capitalists in books and some minor speculators in books together with the journeymen and apprentices employed by them.

The Company of Stationers has played an important role in English copyright from 1556 to 1912; the records of entries in its books is now *prima facie* evidence of the date of publication and ownership at the time the entries were made. Its by-laws or decree became binding in the printing and selling of books. The important by-laws were:

August 17, 1681—Members were not to print or sell the works registered by another member, without his consent, under penalty of 12 pence for each book printed or offered for sale.

May 14, 1694—All new books and reprints to be registered in the name or names of members of the company.

#### REFERENCES:

A Brief Account of the Worshipful Company of Stationers by Charles Robert Rivington, F.S.A., Clerk of the Company, (1910).

Extracts from the Register of the Stationers' Company of Works Entered for Publication Between the Years 1557 and 1570 by John Payne Collier, (London, 1848).

A Short Account of the Worshipful Company of Stationers, 500th Anniversary of the Foundation of the Company (1403-1903) London, (June, 1903).

A Transcript of the Register of the Company of Stationers of London edited by Edward Arber, London, 1875 (5 volumes).

(e) *Ordinances—Statutes.*

When Charles I fled from London during his bitter controversy with Parliament his signature to Laws passed



by Parliament could not be obtained. Parliament nevertheless put the Law in effect under the term "Ordinance".

June 14, 1643, Parliament passed an ordinance that no order or declaration of either of the houses of Parliament could be printed unless first licensed and registered at Stationers Hall.

This ordinance enraged John Milton; he published his famous plea, "AREOPAGITICA", for a free and unlicensed press.

1649—No book to be printed or entered without the consent of the owner.

1662—The Licensing or Printing Act (13 & 14 Car. II, Chapter 33).

All books were to be registered with the Stationer's Company; No book to be printed without the Consent of the owner.

The act was renewed or extended from time to time until 1694 when finally expired.

The act was aimed chiefly and directly at the press. While it was pending, the King sent a special message to the House of Commons saying the law was necessary for the peace of the Kingdom. The exorbitant liberty of the press had been a great occasion of the late rebellion and the schism of the church.

## 5. Trials and Punishment.

The present day lawyer would be indignant of the unfair treatment of the accused, shocked by the indecent haste of the proceedings and horrified by the sentence in the criminal trials of this period.

(1) The Case of William Prynne in Star Chamber Feb. 7, 1632 (1 State Trials 418).

Prynne was prosecuted for Libel in publishing a book entitled *Histrio Mastix*. He was a graduate of Oxford, a member of the Bar and an ardent Puritan.

He worked seven years collecting materials for this book, which showed that all actors, playwrights, and theater-goers were 'sinful, heathenish, lewd, and ungodly.'



He reserved his choicest denunciation for women actors, which brought the queen and her private theatricals into the affair.

"The queen had acted a part herself, in a Pastoral at Somerset House; this book of Prynne was showed her as leveled at her, there being a reference in it, woman actors notorious whores"; though in truth the book was published six weeks before the Queens acting.

- (1) He was to be disbarred
- (2) Deprived of his University degrees
- (3) To stand twice in the pillory, to have one ear cut off each time
- (4) To be fined £5,000 and
- (5) To be perpetually imprisoned without books, pen, ink or paper.

In 1637, he was again charged with publishing a seditious and libelous book "News from Ipswich" and having lost his ears by the court in 1632, he was sentenced to lose the remainder of them and to be branded on each cheek with S. L.—Seditious Libeller. On June 30, 1637, the sentence was carried out, the hangman sawing off the remainder of Prynne's ears. The court noticed that Prynne's ears were not entirely off and he was sentenced to lose the remainder which was done so cruelly and closely that part of his cheek was cut off with the ear.

(2) Other men who criticized the church for its loose Sabbath-keeping and its tendency toward papistry stood in the pillory, or sat in the stocks, while the common people stood by pitying.

(3) The authorized version of the English Bible in 1611. Translation although under the direction of the King was really done by Robert Barker, the King's Printer. Many of the editions of this Bible contain extraordinary errors. The King's Printer and Martin



Lucas were *fined* £3000 in 1632 for having printed the seventh commandment: "*Thou shalt commit adultery*" when it should have read: "*Thou shalt not commit adultery*".

(4) In several instances where errors were made in printing of the Bible, the Star Chamber or the High Commission ordered the right hand of the printer to be cut off.

(5) 1637—Mr. Pickering said the King (Charles I) was reconciled to Rome; he also built a pig sty on ground belonging to a churchyard. He was fined £10,000, put in the pillory, his ears cropped, he was whipped, branded with a hot iron, his tongue was bored with an awl, and he was imprisoned for life.

(6) 1619—The Earl of Suffolk and his lady were dealt with for smuggling and cheating the Government out of its fees. Edward Coke voted them a fine of £100,000 on the earl and the countess. It was finally settled at £30,000 for the earl and £2,000 for the countess. The earl and countess were sent to the Tower.

(7) 1630—A Scotch writer named Leighton was flogged and his ears cut off by order of the Star Chamber for writing bitterly against bishops.

(8) Cropping of ears and slitting the nose were statutory punishments for brawling in church and provision was carefully made by statute for branding in the event the offender's ears had already been cut off.

#### **4. The Prerogative of the Crown: the King's Printer.**

The King claimed the right to publish statutes, orders and decrees of the Government. As head of the Church, he claimed the right to publish prayer books, hymns, psalters, bibles and other books and papers relating to Church activities.



The Royal Prerogative is discussed in

Attorney General for New South Wales vs. Butterworth & Co. Australia Ltd., Decided April 6, 1938

38 State Reports, New South Wales, 195

Reviewed in MacGillivray's Copyright Cases, 1938-1939, page 324.

Long Innes, C. J., stated in his opinion the difficulty and importance of the case

"may be gauged by the fact that the argument occupied twenty-three days . . ."

The right of the Crown in copyright matters is traced from its earliest origin and all the cases on the subject are stated in the opinion.

For a discussion of the Office of King's Printer and corruption in the Office, see Law of Copyright, 4th Edition, by E. T. Scrutton, London (1903), page 7.

Baskett vs. Cambridge University (1758) 1 W. Blackstone 105.

## 7. John Milton and the beginning of Copyright.

November, 1644—*John Milton* published his speech entitled, "AREOPAGITICA". The speech was made in defense of the liberty of unlicensed printing. It was made after the passage by Parliament of the Licensing Act of 1643.

Milton said:

"in order to deliver the press from the restraints with which it was encumbered and that the power of determining what was true and what was false, what ought to be punished and what to be suppressed might no longer be entrusted to a few illiterate and illiberal individuals who refused their sanction to any work which contained views or sentiments at all above the level of the vulgar superstition."



... "the just retaining of each Man his several Copy: which God forbid should be gain-said."

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Milton's book *EIKONOKLASTES* was written in 1649. It was a reply to *EIKON BASILIKE*, a book composed by Dr. Gaudan, a clergyman of the Church of England, and palmed off as an authentic paper written by King Charles I not long before his execution in January, 1649. Gaudan's book made an immense impression upon the people of England and to counteract this, Milton was employed by Cromwell to write a reply. In this reply, Milton said:

"Every author should have the property of his work reserved to him after his death, as well as living"

This is the earliest idea of copyright that came down to us; Milton in 1651 was secretary for foreign tongues to the Council of the Commonwealth under Cromwell. He held the office of Censor or Press Licensor.

#### EARLY USE OF THE PHASE "COPYRIGHT"

1666

*Atkins v. Stationers Company*

Discussed in—*Millar v. Taylor*, 4 Burrows Reports 2316

"That a copyright was a thing acknowledged at common law"

1672

*Roper v. Streater*

Discussed in *Millar v. Taylor*, 4 Burrows Reports 2316

"That the plaintiff, by purchase from the executors of the author, was owner of the copy at common law."

February 11, 1751

*Midwinter v. Kincaid*

4 Burrows Reports 2319, Common Law Copyright.

W. Murray (Lord Mansfield) appeared for the appellant.



*November 26, 1751*

Tonson v. Walker, 4 Burrows Reports 2325.

The case was argued by Lord Mansfield. It was upon the general grounds "of copyrights at common law".

*April 8, 1755*

Manley v. Owen

The Lord Chancellor said:

"It would be a violation of the author's common law right to the copy."

### **8. The First English Copyright Act.**

It was passed in 1709; it went into effect April 10, 1710. The Bill provided:

(1) After April 10, 1709, the author of any book or books already printed and not transferred shall have the right to print or reprint the same for a term of 21 years.

(2) The author of any book already composed and not printed, and thereafter to be printed, he and his assigns shall have the sole liberty of printing for a term of 14 years and no longer. A penalty of one penny for every sheet was provided for violators of the law; one half to the Queen and the other half to the person that sued for the same.

(3) Each book must be entered before publication in the registry book of the Stationers' Company and copies shall be deposited.

(4) The Act contained a price fixing clause if the Sellers' price was too high or unreasonable; a reasonable figure might be fixed by:

- (a) Archbishop of Canterbury.
- (b) Chancellor or Lord Keeper of the Great Seal.
- (c) Bishop of London.



(d) Chief Justice of the Queens Bench.

(e) Chief Justice of Court of Common Pleas.

(5) Nine copies of each book offered for sale was to be delivered to Stationers Hall; these were for the use of:

The Royal Library

Oxford

Cambridge

Four Universities of Scotland

Sion College, London

Library of Edinburgh

(6) After the expiration of the term of 14 years, the sole right of printing shall return to the author, if then living, for another term of 14 years.

#### **9. Did Copyright exist independent of the Statute of Anne?**

The question is discussed and answered in cases of:

(1) *Tonson vs. Collins*.

(2) *Millar vs. Taylor*.

(3) *Donaldson vs. Beckett*.

Because of the great importance of the question involved the three cases will be discussed at length

(1) *Tonson vs. Collins* (1760) 1 W. Blackstone 301, 321

Wedderburn appeared for the plaintiff; Thurlow appeared for the defendant.

The case was argued before Lord Mansfield. Lord Mansfield set the case over for further argument

"before all the twelve judges".



The judges afterwards learned

“that the whole case was a collusion and that the defendant was nominal only and the whole expense paid by the plaintiff.”

The Judges refused to decide the case.

(It was the usual practice of the Court to have re-arguments of Cases and often sent a Cause to be heard by the full court of 12 judges.)

(2) *Millar vs. Taylor*

First argument, June 30, 1767

Mr. Dunning appeared for the plaintiff;  
Mr. Thurlow appeared for the defendant.

Second argument, April 20, 1769

Mr. Blackstone appeared for the plaintiff;  
Mr. Murphey appeared for the defendant.  
4 Burrow's Reports 2303

The questions involved were:

(1) Does the “copy of a book” belong to the author by common law? The phrase “copy of a book” is defined as the sole right of printing, publishing and selling.

Judge Ashton	} voted yes
Lord Mansfield	
Willes, J.,	
Yates, J. voted no.	

(Lord Abinger in the case of *Chappell vs. Purday*, 1841, 14 Messon & Welsby 303, said that the Willes' opinion was the work of Lord Mansfield.)

(2) Does the Statute of Anne take away common law copyright?

Lord Ashton	} voted no.
Lord Mansfield	
Willes, J.,	
Justice Yates voted yes.	



Lord Mansfield said:

"This is the first instance of an official difference of opinion in this court since I sat here. Every order, ruling, judgment and opinion has hitherto been unanimous."

This case reviews in full the activities, decrees and by-laws of the Star Chamber and the Stationers Co.

(3) *Donaldson vs. Beckett*

2 Brown's Cases in Parliament 129

17 Cobbett's Parliamentary History of England 953  
February 22, 1774

(Discussed in *Millar v. Taylor*, 4 Burrow's Reports 2408; 17 The Parliamentary History of England 953, A. D. 1771-1774, published 1813.)

James Thomson wrote a tragedy entitled "Sophonisba" and also a poem entitled "Spring". Thomson sold the works to Andrew Millar for the sum of £137, 10 shillings. Thomson was also the author of several other poems entitled "Summer", "Autumn", "Winter", "Britannia", and a poem sacred to the "Memory of Sir Isaac Newton", a "Hymn on the Succession of the Seasons" and an "Essay on Descriptive Poetry"; on July 28, 1729 he sold these poems to John Millan, bookseller, for the sum of £105 and on June 16, 1738, John Millan sold these works to Andrew Millar for the sum of £105.

Andrew Millar died in June 1768. On June 13, 1769, several of these works were sold at auction by Andrew Millar's executors to Thomas Beckett.

Alexander Donaldson of Edinburgh published one of these volumes entitled "The Seasons" and sold many copies.



On January 21, 1771, Beckett filed a bill in Chancery and was granted a perpetual injunction by Lord Chancellor Apsley to enforce a common law copyright.

An appeal was taken to the House of Lords.

The hearing started on February 4, 1774 and ended 22 days later. The House of Lords at that time consisted of two Archbishops, 24 Bishops, many peers of the realm, such as dukes, marquises, earls, viscounts and barons and 16 Scotch peers that were selected from the Scotch nobility to represent Scotland in the House of Lords. None of the judges were members of the House of Lords, except Lord Mansfield, who was a judge and also a peer. It had been customary from the reign of Edward I to summon judges of the common law courts to attend the House of Lords from time to time in an advisory capacity. The twelve judges who attended pursuant to the summons of the House of Lords were:

Lord Mansfield, then Chief Justice of the Court of King's Bench;

Lord Chief Justice DeGrey, Court of Common Pleas;

Lord Chief Baron Smythe, Common Law Division of the Court of Exchequer, and the three associate justices of each of those courts.

The associate justices of the Court of the King's Bench included Justice Blackstone, who had been raised to that Bench from the Bar since the decision in the case of *Millar vs. Taylor* in place of Justice Yates, who had died. Blackstone had been one of the counsels for plaintiff in that case; Attorney General Thurlow (later Lord Chancellor of England) was counsel for the appellant and Solicitor General Wedderburn (later Lord Chancellor of England) was counsel for the appellee.

Lord Camden was formerly Chief Justice of the Court of Common Pleas and afterward Lord Chancellor; he did



not occupy any judicial position when he took the floor in the *Donaldson vs. Beckett* case. Camden and Mansfield were recognized as the most learned justices and the most eloquent orators in England. Lord Mansfield, whose family name was William Murray, and Lord Camden, whose family name was Charles Pratt, were prominent members of the English Bar. Pratt was made Chief Justice of the Court of Common Pleas in 1762 and in 1765, he was raised to the peerage as Earl Camden and in 1766, he was made Lord Chancellor. Only one of his cases was reversed in the House of Lords while he was on the bench.

Five questions in writing were formulated and approved by the Lords for submission to the judges. The first three were prepared by Lord Chancellor Apsley, who presided over the House of Lords, the last two were formulated by Lord Camden as expressing more precisely the exact questions which were before the House for decision. The following are the 5 questions and the votes of the judges on each question.

1. Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent?

Ayes 10.

Noes 1.

Nares, J.

Eyre, B.

Ashurst, J.

Blackstone, J.

Willes, J.

Aston, J.

Gould, J.

Smythe, C. B.

DeGrey, C. J.

Perratt, B. (subject to the qualification that an author could not bring an action against any person who printed, published, and sold the same un-



less such person obtained a copy by fraud or violence).

Adams, B. (of the same opinion as Perratt, B.)

(Lord Mansfield agreed with majority and answers "Yes")

### THE SECOND QUESTION.

If the author had such right originally, did the law take it away on his printing and publishing such book or literary composition; and might any person afterwards reprint and sell for his own benefit such book or literary composition against the will of the author?

Ayes 4.

Noes 7.

Eyre, B.

Nares, J.

Perratt, B.

Ashurst, J.

Adams, B.

Blackstone, J.

DeGrey, C. J.

Willes, J.

Aston, J.

Gould, J.

Smythe, C. B.

(Lord Mansfield agreed with the answer "No")

### THE THIRD QUESTION.

If such action would have lain at common law is it taken away by the statute of 8 Anne; and is an author by the said statute precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby?

Ayes 6.

Noes 5.

Eyre, B.

Ashurst, J.

Nares, J.

Blackstone, J.

Perratt, B.

Willes, J.

Gould, J.

Aston, J.

Adams, B.

Smythe, C. B.

DeGrey, C. J.

(Lord Mansfield votes "No")



## THE FOURTH QUESTION. 1

Whether the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity by the common law?

Ayes 7.

Nares, J.  
Ashurst, J.  
Blackstone, J.  
Willes, J.  
Aston, J.  
Gould, J.  
Smythe, C. B.

Noes 4.

Eyre, B.  
Perratt, B.  
Adams, B.  
DeGrey, C. J.

(Lord Mansfield answered "Yes")

## THE FIFTH QUESTION.

Whether this right is in any way impeached, restrained, or taken away by the statute 8 Anne.

Ayes 6.

Eyre, B.  
Nares, J.  
Perratt, B.  
Gould, J.  
Adams, B.  
DeGrey, C. J.

Noes 5.

Ashurst, J.  
Blackstone, J.  
Willes, J.  
Aston, J.  
Smythe, C. B.

(Lord Mansfield answered "No")

Mr. Justice Ashurst delivered the opinion of Mr. Justice Blackstone, who was absent being confined to his room with gout upon the said questions.

Blackstone voted for perpetual copyright; thus he supported his financial interests in copyright. Berrell stated (Law and History of Copyright in Books. By Augustine Berrell. — London, 1899, p. 131):



"Sir W. Blackstone published his famous Commentaries in four volumes in so many different years, and he entered each volume on its publication on the Register of the Stationers' Company. The copyright of the whole book he afterwards sold to Cadell and two other\* booksellers for (I think) £4000. On the expiration of fourteen years from the date of publication, being still alive, he assigned to the same booksellers his interest in the second statutory term of fourteen years, and also he assigned all his corrections and alterations of and in the text and notes."

The vote of the judges was close. A considerable majority of the judges believed in the doctrine of perpetual copyright at common law, whilst it was but by a majority of one that they held that the statute of Anne brought death of Common Law copyright by publication.

"It was notorious, that Lord Mansfield adhered to his opinion; and therefore concurred with the eight, upon the first question; with the seven, upon the second; and with the five, upon the third. But it being very unusual, (from reasons of delicacy,) for a Peer to support his own judgment, upon an appeal to the House of Lords, he did not speak."

Lord Camden, Lord Lyttleton, Lord Chancellor Apsley, the Bishop of Carlisle and Lord Effingham spoke on the case. Lord Mansfield did not speak.

Lord Camden said:

"The arguments attempted to be maintained on the side of the respondents were founded on patents, privileges, Star Chamber decrees, and the by-laws of the Stationers Company; all of them the effects of the grossest tyranny and usurpation; the very last places in which I should have dreamt of finding the least trace of the common law of this kingdom."

"Glory is the reward of science, and those who deserve it, scorn all meaner views; I speak not of the



scribblers for bread, who teaze the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter press. When the bookseller offered Milton (£5) five pound for his *Paradise Lost*, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality.

“Instead of salesmen, the booksellers of late years have forestalled the market, and become engrossers. If, therefore, the monopoly is sanctified by your lordships’ judgment, exorbitant price must be the consequence; for every valuable author will be as much monopolized by them as Shakespeare is at present, whose works, which he left carelessly behind him in town, when he retired from it, were surely given to the public if ever author’s were; but two prompters or players behind the scenes laid hold of them, and the present proprietors pretend to derive that copy from them, for which the author himself never received a farthing. . . .”

Lord Camden moved for a reversal of the judgment of the lower court; the motion prevailed by a vote of 22 to 11.

Those who voted to reverse were: (22)

Duke of Bolton  
 Duke of Roxburgh  
 Earl Abercorn  
 Earl Denbigh  
 Earl Gower  
 Earl Jersey  
 Earl London  
 Earl Northingham  
 Earl Oxford



Earl Radnor  
 Earl Roseberry  
 Earl Sandwich  
 Earl Spencer  
 Viscount Falmouth  
 Viscount Say & Seal  
 Viscount Weymouth  
 Lord Camden  
 Lord Montague  
 Lord Ravensworth  
 Bishop of Coventry  
 Bishop of Litchfield  
 Bishop of St. Asaph

Those who voted to affirm were: (11)

Archbishop of Canterbury  
 Bishop of Chester  
 Duke of Northumberland  
 Duke of Portland  
 Marquis of Rockingham  
 Earl Carlisle  
 Earl Fitzwilliam  
 Viscount Dudley  
 Viscount Torrington  
 Lord Bruce  
 Lord Lyttleton

"With great abilities, generally very ill applied; with a strong sence of religion, which he never suffered to influence his conduct, his days were mostly spent in splendid misery; and in the painful change of the most extravagant gaiety and the deepest despair. The delight, when he pleased, at the first and most select societies, he chose to pass his time, for the most part, with the most profligate and abandoned of both sexes" (2 Brown's Cases in Parliament 129)



Thus ended, forever, the booksellers' dream for perpetual copyright.

The case of Donaldson vs. Beckett is the greatest of all cases relating to English copyright. Both sides of the question were masterly presented by the most able counsel in the kingdom. The debate in the House of Lords was bitter, venomous and acrimonious. The case is the foundation of English copyright law and its greatest landmark.

### **8. The Booksellers Petition Parliament for Relief.**

The House of Lords on February 22, 1774 decided in the case of Donaldson vs. Beckett that publication destroyed common law protection.

Feb. 28, 1774. The booksellers of London and Westminster petitioned the House of Commons for protection against the decision in Donaldson vs. Beckett.

The petition stated:

"Many of the booksellers had laid out their whole fortunes in that article, which right had now been taken from them by a later determination; and if some redress was not given them, many families would be totally ruined".

The debates in the Commons and the House of Lords were exceedingly bitter.

Blackstone was attacked for his stand on perpetual copyright and his acceptance of £16,000 royalties on his commentaries.

Edmund Burke speaking in favor of the petition defended Blackstone.

"There could not be a clearer proof of the justice of their cause, or a stronger reason for them to think themselves right, than Judge Blackstone's selling his book to a bookseller for a large sum, and afterwards maintaining the opinion of the booksellers right to literary property."

. . . . .



"If the University of Oxford, one of the eyes of this kingdom, chose him the professor of laws, allotted him the task of instructing youth in the most important of all studies; if the King afterwards appointed him to distribute justice and interpret the laws, if he sold his copy, was it for a bookseller to question his title?"

Governor Johnstone said:

"The honorable gentleman (Mr. Burke) who on Friday last mentioned £7000 as the price paid by one of the petitioners for the copy of Blackstone's Commentaries, was mistaken. The sum paid, as appeared by the original assignment, which he had seen, was £4000, out of which the purchaser received stock in printed books, etc. to the amount of £1400, so that the net receipt of the seller was only £2600, which the governor conceived, even within the term allowed by the Statute of Queen Anne, the buyer might get back."

Attorney General Thurlow spoke against the booksellers:

"They were a set of impudent monopolizing men, that they had combined together and raised a fund of upwards of £3000 in order to file bills in Chancery against any person who should endeavour to get a livelihood as well as themselves; that although they had purchased copies from Homer down to Hawkesworth's voyages, which, he said, was very low indeed, that Hawkesworth's book, which was a mere composition of trash, sold for three guineas by their monopolizing."

Sir John Dalrymple stated:

"A large number of the men who had signed the Petition for the Bill were proprietors of those infamous newspapers which had traduced the sovereign and abused the members of each house of parliament."



Lord Camden stated that the booksellers:

"Never could suppose a common law right, for that it was first supported by Star Chamber decrees; on the expiration of the monopoly granted by the Act of Queen Anne they applied to Parliament for an extension of the monopoly in the years 1735, 1736 and 1737; that the monopolizing booksellers had robbed others of their property; for that printing was a lawful trade, and, without all manner of doubt, therefore they had a property in it; consequently thus to deprive printers of the subject on which they might lawfully exercise their trade, was robbing them of their property; that they had maintained this monopoly by most iniquitous oppressions, and exercised it to the disgrace of printing."

The Bill was lost in the House of Lords by a vote of 21 to 11.

(The vote on the case of *Donaldson vs. Beckett* was 22 to 11.)

See: Cobbett's Parliamentary History, Vol. 17, pp. 1077, 1400.

## 9. Additional Copyright Statutes.

(a) 1775

15 George II, Chapter 53

This act gives the four universities mentioned in the act the perpetual right to reprint the books given to them.

The universities mentioned in the act are:

the two universities in England, the four universities in Scotland, and the several colleges of Eton, Westminster and Winchester.

The Universities were so much alarmed by the decision in the case of *Donaldson vs. Beckett* that in the year 1775, they applied for and obtained an Act of Parliament securing to them perpetual copyright.



(b) 1735

8 George II, Chapter 13

Protection given to engraving

(c) 1797

38 George III, Chapter 71

Protection given to statuary, models, busts

(d) 1814

54 George III, Chapter 156

*Term of copyright 28 years from date of publication, and if author shall be living, for the rest of his life.*

(e) 1833

3 & 4 William IV, chapter 15

*The Bulwer Lytton Act—protected the right of public performance in dramatic works.*

(f) 1842, July 1

5 & 6 Victoria, chapter 45

*The Talfourd Act—the term of copyright was fixed at forty-two years after publication or the life of the author plus seven years, whichever was the longer.*

Talfourd's Bill was supported by Disraeli, Monckton Milnes (afterward Lord Houghton) and opposed by Hume, Grote and the philosophic radicals on the ground that any extension of copyright must enhance the price of books.

The contest was on the length of the term of protection. Lord Macaulay made two notable speeches in Parliament on the bill:

Feb. 5, 1841	}	see: the works of Lord Macaulay,
April 6, 1842		
		Vol. II, pp. 658, 677



Talfourd wanted sixty years from the death of the author but was willing to accept thirty. Macaulay said there was no natural right to literary property; copyright was a monopoly making books dear and the extension of the term beyond the author's death would not benefit the author. He said:

“Copyright was a tax on readers for the purpose of giving a bounty to writers”

The bill against which Macaulay's speech was directed was rejected by 45 to 38. Bulwer-Lytton, Disraeli, Gladstone, Lord John Russell, Lord George Bentinck and Sheil were for the minority; Macaulay and Joseph Hume were for the majority. Lord Talfourd went on the bench and Lord Mahon succeeded him and took up the bill. The struggle was on a fixed date after the author's death for a term of copyright. Macaulay made a powerful speech; his amendment was carried by a vote of 68 to 56. Peel then suggested that the term be extended seven years after the author's death for the benefit of his children and in spite of Macaulay's opposition, it was carried. The term was finally fixed at 42 years from publication or 7 years from the death of the author, whichever shall be the longer.

(g) 1882, August 10

45 & 46 Victoria, chapter 40

*The Copyright (Musical Composition) Act—The copyright owner in order to retain the right of performance must publish a notice reserving such right on the title page of every published copy of the music.*

If the copyright and right of performance are separated, the owner of the latter has to give the owner of the former a direction to print the above notice, and a penalty is provided for failure of the copyright proprietor to comply.

Section 4 (repealed by 51 & 52 Victoria, chapter 17) gives discretion to the judge as to costs in actions for infringement of musical performing right, in cases where



the plaintiff shall not recover more than 40 shillings as penalty or damages.

(h) 1888, July 5

51 & 52 Victoria, chapter 17

The Copyright (Musical Compositions) Act—Amends the law as to penalties and damages in the case of musical copyright; such damages shall be reasonable and may be nominal and the costs are to be in the discretion of the judge.

The proprietor of the place of entertainment is not to be liable unless he wilfully causes or permits the unauthorized representation or performance knowing it to be unauthorized.

The Act does not apply to actions in respect of a performance of an opera or stage play in a theatre or other place of public entertainment duly licensed.

The right to print a musical composition rests upon the Act of 1842. The right to perform a musical composition is to be collected from the provisions of the Acts of 1833 and 1842 and the Acts of 1882 and 1888. There are three distinct rights in a song:

1. The right to print the music, which may be in different hands as to the tune and accompaniment;
2. The right to print the words;
3. The right to perform the music.

These rights may belong to different persons at the same time. The penalties for statutory infringement was 40s. for performing a dramatic or musical composition in public.

The Act of 1882 left the penalty the same. However, the Act of 1888 left the costs and the damages to the judge. The author of a musical composition has:

1. The right of performance of such composition in public for 42 years from the first publication or



the life of the author and 7 years after his death, which ever shall be the longer term, and

2. The sole right of publishing such composition in print for the same period—42 years from the first date of publication or 7 years after his death, whichever is the longer. The work must first be published or performed in the British Dominions.

**10. In re: Wall, 4 Times Law Reports 749, August 3, 1888.**

The Bulwer Lytton Act of 1833, supplemented by the Copyright Act of 1842, fixed a statutory penalty of 40 shillings for an illegal performance of music.

A Mr. Harry Wall of London conceived the idea of collecting royalties on performing rights on a vast scale and carried on a business under the name of Copyright Performing Right Protection Office. He secretly purchased the performing rights to a great many musical compositions and declined to announce to the public or to the users of the music the compositions in which he claimed rights, except upon payment of 21 guineas for each composition concerning which he gave this information. He proceeded in cooperation with a London solicitor ruthlessly to enforce his claim.

On August 3, 1888, Wall and his solicitor were arraigned in court for illegal conduct in prosecuting these claims. The solicitor was suspended from practice for two years and Wall was sentenced to three months in prison.

This led to an investigation by Parliament with the result that an Act was passed requiring a claim of performing rights to be stamped on each sheet of music; in the absence of this claim, the performing rights were lost. It was also left to the discretion of the court the damages to be assessed for an infringement and whether or not costs were to be imposed.



## 11. Confusion in English Copyright Law.

In 1875, a Royal Commission was appointed to appraise the copyright laws of England; this committee consisted of the leading men in England learned in the law.

"The well-beloved James Fitzjames Stephen, Esq., one of our counsel learned in the law"

made a digest of the copyright laws of England which was included in the report. A great number of witnesses were called, including judges and barristers who practiced copyright, publishers and authors and a complete survey was made. On May 24, 1878, an intermediate report was made; in that report, the condition of the copyright law of England was appraised.

"The law of England, . . . consists partly of the provisions of fourteen Acts of Parliament, which relate in whole or in part to different branches of the subject, and partly of common law principles, nowhere stated in any definite or authoritative way, but implied in a considerable number of reported cases scattered over the law reports."

"The first observation which a study of the existing law suggests is that its form, as distinguished from its substance, seems to us bad. The law is wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill-expressed that no one who does not give such study to it can expect to understand it."

"The common law principles which lie at the root of the law have never been settled. The well known cases of *Millar vs. Taylor*, *Donaldson vs. Beckett*, and *Jeffreys vs. Boosey*, ended in a difference of opinion amongst many of the most eminent judges who have ever sat upon the Bench."

"The fourteen Acts of Parliament which deal with the subject were passed at different times between 1735 and 1875. They are drawn in different styles, and some are drawn so as to be hardly intel-



ligible. Obscurity of style, however, is only one of the defects of these Acts. Their arrangement is often worse than their style. Of this the Copyright Act of 1842 is a conspicuous instance."

"The law is not only arbitrary in some points, but is incomplete and obscure in others. The question whether there is such a thing as copyright at common law, apart from statute, has never been decided, and has several times led to litigation; yet the courts have always leant to the opinion that there is no copyright independent of statute;—at all events they have never positively decided that there is."

## **12. Boosey vs. Whight.**

1899, 1 Chancery 836

1900, 1 Chancery 122

A perforated music roll for reproduction on a mechanical device is not a copy of sheet music. This follows the case of *White-Smith Music Publishing Company v. Apollo* in the United States in 1908.

## **13. The Copyright Act of 1911.**

Passed December 16, 1911, effective July 1, 1912.

Copyright is granted:

"Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if

(a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and

(b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid, but in no other works."

July 31, 1925 (15 and 16 George V.), Chapter 46  
 An Act to prevent unauthorized reproductions of dramatic  
 and musical performances. See: Musical Performers Pro-  
 tection Association, Ltd. vs. British International Pictures  
 Ltd., June 30, 1930, 46 Times Law Reports 485.

#### 14. References:

- (1) Seven lectures on the Law and History of Copy-  
 right in Books by Augustine Berrell (London  
 1899).
- (2) A Treatise on the Law of Property in Intellectual  
 Productions by Eaton S. Drone (Boston, 1879).

Undoubtedly the best work in the English lan-  
 guage on the basic principles of copyright and its  
 history and development.

It is the Bible of the student of copyright; if he  
 knows Drone, he knows the origin of English copy-  
 right and its development.

- (3) An historical sketch of the Law of Copyright  
 by John J. Lacondes (London, 1842).
- (4) M. Renouard—Des Droits d'auteurs (Paris, 1838).  
 In 1485 when printing was invented there were  
 (10,000) ten thousand copyists in Paris and Or-  
 leans.  
 Copyright in France.

#### (5) Wm. Blackstone

- (a) The Life of Blackstone.

By Lewis C. Warden, A.B., LL.B. Charlottesville,  
 Virginia, 1938.

- (b) Sir William Blackstone.

By David A. Lockmiller, Chapel Hill, North  
 Carolina, 1938.

- (c) Blackstone's Commentaries.

Vol. 2, Chapter XXVI, p. 400. Blackstone's  
 Theory of Common Law Copyright.



- (6) Lord Mansfield by Cecil Herbert Fifont, 1936.
- (7) The Law of Copyright by T. E. Scrutton—Fourth Edition (London, 1903).

An excellent work; it gives a brief history of copyright in England. In 1916 he was appointed Lord Justice of the Court of Appeal; he died Aug. 20, 1934—aged 77 years.

- (8) E. J. MacGillivray.
  - (a) The Law of Copyright (London, 1902).
  - (b) A Digest of the Law of Copyright (London, 1906).
  - (c) Copyright Cases 1901-1940.

MacGillivray, prepared each year a digest of the copyright cases in England and the leading copyright cases in the United States for the periods 1900 to 1940. Starting with the digest of 1906, the digests contained a summary of the important cases included in the volume.

- (9) Coppinger in the Law of Copyright, seventh edition, by F. E. Skone James (London, 1936).
- (10) Report of the Committee on the Law of Copyright (London, 1909).

In 1909, the Law of Copyright Committee presented a report to both houses of Parliament. The committee was made up of persons representing architects, photographers, authors, composers and music publishers; the report contains an excellent analysis of all statutes passed in England until 1909.

- (11) Copyright Commission. The Royal Commissions and the Report of the Royal Commissioner
  - (a) Report of Oct. 6, 1875.
  - (b) Reports from the Select Committee of the House of Lords 1897, 1898, 1899, 1900.

## B. Copyright Legislation in the United States

### I. COLONIAL COPYRIGHT

1. The Colonial Congress lacked the power to pass a copyright law binding on the several states; these powers were limited to recommendations.

On Friday, May 2, 1783, the Colonial Congress acting on the report of a Committee, consisting of Williamson, Izard and Madison, recommended to the several colonies or states:

“to secure to the authors or publishers of any new books not heretofore printed, being citizens of the United States . . . the copy right of such books for a certain time not less than fourteen years from the first publication”

and if the authors survive the first term for an additional term of 14 years; the rights recommended to be granted were the

“exclusive right of printing, publishing and vending”.

2. Three of the original thirteen states had passed copyright statutes prior to the recommendation made by the Colonial Congress on May 2, 1783. These states were:

Connecticut, January 1783

Massachusetts, March 17, 1783

Maryland, April 21, 1783

3. All of the thirteen states, except the state of *Delaware*, had passed copyright statutes prior to the adoption of the United States Constitution; the statutes were passed as follows:

1. 1783, January—Connecticut

2. 1783, March 17—Massachusetts

3. 1783, April 21—Maryland



4. 1783, May 27—New Jersey
5. 1783, November 7—New Hampshire
6. 1783, December—Rhode Island
7. 1784, March 15—Pennsylvania
8. 1784, March 26—South Carolina
9. 1785, October—Virginia
10. 1785, November 19—North Carolina
11. 1786, February 3—Georgia
12. 1786, April 29—New York
13. Delaware—No law passed.

For Noah Webster's role in Colonial Copyright see:

"Noah Webster, Schoolmaster to America"  
by Harry R. Warfel (New York, 1936)

4. The first reported case on copyright infringement in the United States was brought under the Connecticut Colonial Copyright Act which was passed in January, 1783. The case of *Hudson and Goodwin vs. Patten* was tried in the Hartford County Court, Connecticut, September Term 1789. It is reported in Root's Reports, Volume I, page 133. It is the only reported case under the Copyright Statutes of the Colonies.

The plaintiffs purchased the copyright in Webster's *Institute of English Grammar*, for Connecticut, Vermont and remaining New England states; they were to pay to Webster £5 for every 1,000 copies sold.

Thereafter, one Campbell purchased from Webster the right to print and sell copies in the State of New York. Campbell employed the plaintiffs to print 2,000 copies of the work and to ship the copies to Campbell in New York. The defendant went to New York, purchased 1,500 copies of the work from Campbell and brought them to Hartford and sold them.

The Jury rendered a judgment for the plaintiffs and fixed the damages at £100.

## II. COPYRIGHT LEGISLATION IN THE UNITED STATES

1. Article 1, Section 8, of the United States Constitution reads as follows:

“The Congress shall have power :

To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.”

2. Works protected under the various United States Copyright Acts; unless otherwise stated, the rights granted are the sole right “of printing, reprinting, publishing and vending”.

(from May 31, 1790 to March 4, 1909, the United States Copyright Acts prohibited the publishing of a manuscript without the consent of the author.)

1790, MAY 31

Maps, charts and books.

1802, APRIL 29

Designs, engravings, etchings and prints were protected for the first time.

1831, FEBRUARY 3

THE COPYRIGHT ACTS ARE CODIFIED

The right to print and sell musical compositions is protected for the first time.

Music was not protected in any form under the United States Copyright Acts until the Act of February 3, 1831. On December 17, 1830, the Committee on Judiciary, reporting on the Copyright Bill (Act of February 3, 1831) said :



"It has furthermore been claimed, and, it seems to your committee, with propriety, that the law of copyright ought to extend to musical compositions, as does the English law. It has been the aim of your committee, in preparing the accompanying bill, to bring the two statutes into one, and to make that free from the objections alluded to, but chiefly to enlarge the period for the enjoyment of copyright, and thereby to place authors in this country more nearly upon an equality with authors in other countries".

1856, AUGUST 18

Right of public performance in a dramatic composition is protected for the first time.

This right, that is, the right to publicly perform or act a dramatic composition, was known as "play right" or "stage right". Protection, however, was only to the so-called "grand performing rights" or dramatic rights and extended to the music only if it was a part of a dramatic work. The "small performing rights" were not protected.

1865, MARCH 3

Photographs and negatives thereof are protected for the first time.

Prior to the enactment of this law, the Court held that a photograph is not a print, cut or engraving. See:

*Wood v. Abbott* (Decided in the United States Circuit Court, Southern District of New York, July 1866) 5 Blatchford 325, 30 Federal Cases 424 (Case No. 17938).

The word "pamphlet" is used for the first time, in the United States Copyright Acts.

The word "book" is defined for the first time; it means every volume and part of a volume including maps, prints or other engravings and includes any copy of second or subsequent editions.

1870, JULY 8

## COPYRIGHT ACTS CODIFIED

Paintings, drawings, chromos, statues, statuary, models or designs intended to be perfected as works of the fine arts, and the right to translate and dramatize works are protected.

Right to translate and dramatize works are protected for the first time. The Act states:

“Authors may reserve the right to dramatize or to translate their own works.”

Prior to the passage of this Act, (July 8, 1870) translations were not protected by the copyright laws.

It was held by Judge Grier in the “UNCLE TOM’S CABIN” case that a translation was not a copy.

*Stowe vs. Thomas*, Circuit Court, Eastern District of Pennsylvania, October Term 1853, 2 Wall Jr. 547, 23 Federal Cases 201 (Federal Case No. 13514).

The defendant made a German translation of “UNCLE TOM’S CABIN”. On the trial, his counsel said:

“We have confessedly taken not a part, but the whole. We concede and we boast that we have taken every syllable, comma and i-dot of the original. The question cannot be how much we have taken, for we have taken all; nor how much we have added, for we have added nothing; but only how we have taken and what we have done with it”.

The Act of August 18, 1856 gave protection to the public performance of a dramatic composition but the right to transform a novel or other literary work into a drama was not granted until the Act of July 8, 1870.

1873, DECEMBER 1

## REVISION OF THE COPYRIGHT ACT.

Books, maps, charts, dramatic or musical compositions, engravings, cuts, prints, photographs and negatives thereof,



paintings, drawings, chromos, statues, statuary, models or designs intended to be perfected as works of the fine arts, public performance of a dramatic composition, and the right to dramatize and translate works, were protected.

1891, MARCH 3

#### THE CHACE COPYRIGHT ACT

Copyright protection given to works of foreign authors for the first time.

#### The Manufacturing Clause

1897, JANUARY 6

Small performing rights in a musical composition are protected for the first time; the performing rights in all music, whether dramatic or otherwise, were protected.

Under the Law of August 18, 1856, the performing rights in a musical composition were protected only if it was a dramatic musical composition.

This act is the foundation of the American Society of Composers, Authors and Publishers (A. S. C. A. P.).

In reporting this Bill (January 6, 1897) the Committee (Report No. 741, 54th Congress, First Session) said:

"In recent years the business of producing and staging plays and operas by American authors has largely increased and in many instances has met with the very highest measure of success. Many of the best stage productions of modern times have been the work of American authors. These productions in many instances have been carefully and elaborately placed upon the stage at very heavy expense to the proprietors and managers and their representation has given employment in various ways to thousands of people. The existing law relative to copyrights has been found to be inadequate to protect authors and producers of American plays and operas in the enjoyment of their rights of prop-

erty in these duly copyrighted productions. Persons in various sections of the country have, without the shadow of right, pirated these works, and confining their operations chiefly to the smaller and more remote towns have given representations to these stolen productions for their own individual profit, and without making any compensation whatever to the authors and owners. Under existing conditions no adequate remedy exists for this unlawful usurpation of property rights. The offenders are almost uniformly men without attachable means and defy all the ordinary processes by which they might be mulcted in damages \* \* \*. The Bill provides that the piracy, *i.e.*, the unauthorized production of any copyrighted play or opera, if it be determined that such unauthorized representation be for profit, shall be a misdemeanor, and shall subject the offender, upon conviction, to the liability of imprisonment for a period not to exceed one year \* \* \*. The unauthorized publication of a copyrighted book may ordinarily be adequately punished, by civil proceedings under the provisions of the existing law. The offender in such a case is a person of fixed domicile and has a press and implements of his business, so that the ordinary process of the court may readily be served upon him, and he may be compelled to respond in damages for his wrongdoings. These conditions do not exist as a rule in the case of the professional play pirate \* \* \*. Testimony has been adduced before the committee; showing that the losses accruing to authors and owners of copyrighted productions by these piracies amount to large sums each year. So little protection is in fact afforded under existing conditions, that many prominent American dramatic authors no longer go to the trouble and expense of taking out copyrights for their works. Believing that productions of the character mentioned constitute property in the fullest and best sense of the term, your committee sees no good reason why this species of literary production should not be surrounded by the same measure of protection as is accorded to other classes of property. Your committee recommends that the bill



do pass, with the amendment suggested (i.e., substitution of word 'musical' for 'opera' ).

### 1907, OCTOBER

The United States Supreme Court decided that a perforated music roll for reproduction or performance on a mechanical device was not an infringement; it was not a copy of the sheet music.

*White-Smith Music Publishing Company v. Apollo*, 209 United States Reports 1.

### 1909, MARCH 4

#### REVISION OF THE COPYRIGHT ACT

Protection to works under the prior Copyright Acts was continued; broader rights and greater protection were granted to authors.

Compulsory license on recorded music.

Right to mechanically reproduce music was protected for the first time; this was to nullify the decision in the case of *White-Smith Music Publishing Company v. Apollo*.

The mechanical rights applied only to musical numbers published after July 1, 1909.

The right to novelize was granted for the first time by the Act of March 4, 1909. The right to dramatize was granted by the Act of July 8, 1870, but the right to novelize, that is, the right to convert a dramatic work into a novel was not granted until the Act of March 4, 1909. See:

*Pitch v. Young*, United States District Court,  
Southern District of New York, March 15,  
1916, 230 Fed. Rep. 743. Judge Learned  
Hand said:

"Any right to novelize the play in such form as does not result in a 'copy' is a right in the public domain".

Prior to the passage of this Act, the right to novelize a dramatic work, if protected at all, was protected on the theory that the story form of the dramatic work or play was in fact a copy of the play or dramatic work in narrative form. See:

*Hervieu v. J. S. Ogilvie Publishing Company*,  
United States Circuit Court, Southern District of New York, March 23, 1909, 169 Fed. Rep. 978.

The Act of March 4, 1909 does not grant the right of public performance in poems.

*Kreymborg v. Durante and National Broadcasting, Inc.*, decided June 1, 1934, reported in U. S. Patents Quarterly, Vol. 21, June 1st, 1934, page 557.

The Act does not prohibit the reading of a play before a paid audience with gestures and intonation of voice to distinguish the characters.

*Marc Connelly and Laurence Rivers, Inc. v. Irving Pichel*, United States District Court, Southern District of California, Central Division, August 1, 1934, opinion by Hollzer, J. not reported.

See:

*Corcoran v. Montgomery Ward & Co.*, 121 Fed. 2d 572, June 28, 1941. Writ of certiorari denied. 314 U. S. 687.

#### CASES UNDER THE FEDERAL COPYRIGHT STATUTES

The first reported case under the United States Copyright Act of May 31, 1790 is:

*King v. Forre*, 14 Federal Cases 521, (Federal Case No. 7791)



The case was tried in the Circuit Court of the District of Columbia, decided in June 1820. The Court held:

That the failure to have the date of deposit of the title of a map engraved on the map was fatal to plaintiff's title.

The first case heard in the United States Supreme Court was the case of:

*Wheaton v. Peters*, 33 United States Reports 725.

It was heard at the January 1834 Term of the Supreme Court. It was an appeal from the Circuit Court for the District of Pennsylvania.

Wheaton was the reporter of the United States Supreme Court and the opinions which he collected and edited were known as "Wheaton's Reports".

The Court held:

(1) That the reporter of the Supreme Court has not copyright in the written opinions delivered by the Court.

(2) That there was no common law copyright in the United States as such—common law copyright vested under the state laws.

*Eric Railroad Company v. Tompkins*, 304 United States 64, decided April 25, 1938, reversed the case of *Swift v. Tyson*, decided in the United States Supreme Court, January 1842, reported in 16 Peters 1. The *Tompkins* case will have an unusual bearing on common law copyright infringements tried in the Federal Courts.

### 3. Private Copyright Acts.

Between 1828 and 1898, Congress passed eight private copyright laws taking works out of the public domain and giving them copyright protection. Under one bill, the United States paid \$10,000.00 for a work and then placed it in the public domain.

#### 4. Proposed Revisions of the Act of 1909.

1. The Vestal Bill—introduced in Congress March 17, 1926. The Bill continued in various form in Congress. On January 13, 1931, it passed the House by a vote of 185 to 34. On March 3, 1931, a filibuster in the Senate on other legislation prevented its passage.

2. The Duffy Bill—introduced on April 1, 1935. A hearing was had before the Senate Patents Committee (Senator McAdoo, Chairman) on May 8, 1935. It passed the Senate on August 7, 1935 without a record vote being taken. It is said that thirteen members were present. The Bill did not pass the House.

3. The Shotwell Bill—This Bill was drafted under the auspices of the National Committee of the United States of America on International Intellectual Cooperation, a sub-division of the Carnegie Peace Foundation. The final draft was completed on December 18, 1939; it was introduced in the United States Senate on January 8, 1940 (S. 3043) by Senator Elbert D. Thomas of Utah with a request that the Bill be printed with the original notes. It was printed in the Congressional Record of January 8, 1940. The Bill as presented in printed form to the Senate did not contain the marginal notes. No hearings were held on the Bill.

#### References:

COPYRIGHT ENACTMENTS OF THE UNITED STATES  
1783-1906

Compiled by Thorvald Solberg,  
Register of Copyrights

Copyright Office, Bulletin Number 3,  
Washington, 1906

This work contains copies of the Colonies' Copyright Act and all the Copyright Acts passed by the United States



Congress to 1906. There is included also the special or private acts passed by Congress.

## COPYRIGHT IN CONGRESS

1789-1904

A Bibliographical and Chronological Record of Proceedings in Congress in Relation to Copyright, from April 15, 1789 to April 28, 1904

Prepared by Thorvald Solberg,  
Register of Copyrights,

Copyright Office, Bulletin Number 8,  
Washington, 1905

Hearings before the Committee on Patents, House of Representatives, 74th Congress, 2nd Session, Unrevised copy for use of the Committee on Patents, Feb. 1936, pp. 979, 1039.

Revision of Copyright Laws.

Hearings before the Committee on Patents, House of Representatives, 74th Congress, Second Session.

Revised copy for use of the Committee on Patents, February, March, April 1936, pp. 1005, 1175, 1195, 1215, 1217.

## AMERICAN COPYRIGHT LAW

by Arthur Weil (New York, 1917)

This is the first textbook on copyright since the Act of 1909; it is excellent in its method of presentation.

The book was written when there was only a small volume of litigation under the Act of 1909; very few of the sections of the Act had been tested. However, Weil's analyses of the sections were not followed by the courts, hence Weil refused to allow a reprint of the book.

## C. France

Law of January 13-19, July 19, August 6, 1791—deals with public performances.

Decree of July 19, 1793—deals with copyright.

Decree of March 28, 1853—foreign works protected.

Penal Statutes.

French conception of copyright; moral rights of authors.

Revision of the French Copyright Law proposed by Jean  
Zay, Minister of Education.



MAR 2 - 1945

# PRACTICING LAW INSTITUTE

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## LECTURE

Assembly Room of the New York County Lawyers'  
Association, 14 Vesey Street, New York City.

THURSDAY, NOVEMBER 30, 1944

*on*

## INTERNATIONAL COPYRIGHT

The Berne Convention—Reciprocal Copyright Relations  
Between the United States and Foreign Countries.  
Pan-American Copyright Conventions.

*by*

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*Copyright Adviser to the Twentieth Century-Fox Film Corporation  
and Movietone, Inc.; Chairman of the Copyright Committee  
of the Motion Picture Producers and Distributors of  
America, Inc. (the Hays Organization).*

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OUTLINE OF LECTURE

EXPLANATORY NOTES, DISCUSSIONS, REFERENCES





## I. THE BERNE CONVENTION

### 1. Origin and Purposes.

The International Convention for the Protection of Literary and Artistic Works was first concluded in the City of Berne, Switzerland, on September 9, 1886 and for that reason, is popularly known as the Berne Convention.

#### (a) The Drift Toward International Copyright.

Prior to the Berne Convention, international Copyright was a matter of treaty usually between two countries only. Agitation for international copyright relations and protection began over 100 years ago. England was one of the first countries to enact international copyright legislation. A law was passed July 31, 1838 entitled "An Act for Securing to Authors, in Certain Cases, the Benefit of International Copyright." (1 and 2 Victoria Chapter LIX; the Act required that a copy of each foreign work so protected be deposited at Stationers' Hall and the title entered on the Register.)

Under this Act, the Queen was empowered by an Order in Council:

"To direct that the authors of books which shall after a future time to be specified in such Order in Council be published in any foreign country to be specified in such Order in Council, their executors, administrators and assigns, shall have the sole liberty of printing and reprinting such books within the United Kingdom of Great Britain and Ireland and every other part of the British Dominion \* \* \*"

Almost six years later, on May 10, 1844, Parliament passed an Act (7 and 8 Victoria, Chapter XII) known as "The International Copyright Act." Under this Act, the Queen was empowered by an Order in Council to extend to literary or artistic works first published in any foreign country the benefits of the English Copyright Acts, provided, however, that protection had been secured by such

country for similar works of British subjects first published in England.

There were various minor amendments to the British International Copyright Act from 1844 to June 25, 1886 when an Act was passed entitled "An Act to Amend the Law Respecting International and Colonial Copyright" (49 & 50 Victoria, Chapter 33) in order to permit England to join the Berne Convention.

#### (b) Formation of the International Copyright Union.

The International Literary and Artistic Association (*Association Litteraire et Artistique Internationale*) was founded in Paris in 1878. Its first president was Victor Hugo. It devised the plan of replacing the separate copyright treaties between the different European countries by a general International Copyright Convention. This organization held annual reunions in the European capitals to discuss legislation, domestic and international. At the meeting held in Rome in 1882, the proposition of securing general copyright protection throughout the world was advanced. It was decided to hold a conference at Berne, Switzerland, in September 1883, to prepare a program to serve as a basis for an International Conference. The Swiss Federal Council on September 3, 1883 sent to various countries a draft of the Proceedings of the Conference. A Second International Conference was held at Berne, September 8-9, 1884.

Delegates from fourteen countries were in attendance. A new draft of the convention of twenty-one articles was adopted, dealing with the term of copyright, formalities, translation rights, deposit, registration and kindred subjects.

The Swiss Confederation on October 17, 1884 sent to the various countries the proposed convention for discussion and criticism. Another convention was held at Berne, September 7, 1885; seventeen countries were represented including the United States. The draft of the convention was signed on behalf of:



France	Netherlands
Germany	Sweden
Great Britain	Norway
Haiti	Switzerland
Honduras	Tunis
Italy	

The representatives of the Argentine, Belgium, Costa Rica, Paraguay, Spain and the United States were not authorized to sign and did not sign.

The documents formulated and signed at this conference in 1885 were transmitted by the Swiss President to the countries with an invitation to be present at a conference to be held in Berne, September 6, 1886 for the purpose of signing the final document as an International Convention, requesting the delegates to come with full power to complete the instrument.

The conference was held from September 6 to 9, 1886. Twelve countries sent delegates:

Belgium	Japan
France	Liberia
Germany	Spain
Great Britain	Switzerland
Haiti	Tunis
Italy	United States

On September 9, 1886, a formal convention was adopted and signed by all the delegates except those from Japan and the United States. The convention was ratified and put into effect on September 5, 1887. On that date, the following countries had ratified the convention:

Belgium	Italy
France	Spain
Germany	Switzerland
Great Britain	Tunis
Haiti	

The fundamental principles of the convention are set forth in Articles 2 and 3 which provided that an author of

one of the countries of the Union upon obtaining copyright for his work in the country of origin by compliance with the conditions and formalities prescribed by the laws of the country of origin secured copyright in the other countries of the Union.

(c) Second Conference of the Berne Convention.

(Paris, April 15, 1896)

The Second Conference of the Berne Convention was held in Paris on April 15, 1896. Article 17 of the Convention of 1887 provides:

"The present Convention may be submitted to revision in order to introduce therein amendments calculated to perfect the system of the Union \* \* \* No alterations in the present Convention shall be binding on the Union except by the unanimous consent of the countries composing it".

Paragraph 6 of the Final Protocol to the Berne Convention of 1886 provides:

"The next Conference shall be held at Paris between four and six years from the date of the coming into force of this Convention. The French Government will fix the date within these limits after having consulted the International Office".

At the Paris Conference the following documents were signed:

- (1) Amendment known as an "Additional Act"
- (2) "Declaration Interpreting Certain Provisions of the Convention"

(d) Third Conference of the Berne Convention.

(Berlin, Oct. 14-Nov. 14, 1908)

The Third Conference of the Berne Convention was held in Berlin from October 14 to November 14, 1908. The German Government invited representatives from



countries not within the convention to be present. Representatives of the fifteen countries that had adhered to the convention were present from:

Belgium	Luxembourg
Denmark	Monaco
France	Norway
Germany	Spain
Great Britain	Sweden
Italy	Switzerland
Japan	Tunis
Liberia	

Representatives of nineteen non-Union countries were also present from:

Argentina	Peru
Chile	Persia
China	Portugal
Colombia	Roumania
Ecuador	Russia
Greece	Siam
Guatemala	Uruguay
Mexico	Venezuela
Netherlands	United States
Nicaragua	

The representatives of the non-Union countries had a voice but not a vote in the convention.

A Revised Convention was adopted on November 14, 1908; this is known as the *Berlin Convention*. This document consisted of thirty articles and completely overhauled the Convention of 1887 and the Paris Convention of 1896.

The signatory countries were permitted upon signing the Berlin Convention to carry over certain reservations and rights which they may have had under the two previous conventions.

Under this Convention, protection became automatic upon the creation of the work. Formalities of all kinds were abolished and in theory, the authors of each country within the Union became for copyright purposes, members of a worldwide literary commonwealth. The extent of the

protection, however, and the means of enforcing the rights claimed were regulated exclusively according to the laws of the country in which the right was claimed.

**(e) Fourth Conference of the Berne Convention.**

(Berne, March 20, 1914)

The Fourth Conference of the Berne Convention was held in Berne on March 20, 1914. An additional protocol was signed on March 20, 1914 by eighteen countries:

Belgium	Luxembourg
Denmark	Monaco
France	Netherlands
Germany	Norway
Great Britain	Portugal
Haiti	Spain
Italy	Sweden
Japan	Switzerland
Liberia	Tunis

The Protocol provided that when a country not belonging to the Union does not fully protect the works of authors of a country of the Union, that country may restrict the protection of works of authors of the country which discriminates against the works of authors of the Berne Convention countries. This Protocol was aimed at the United States.

**(f) Fifth Conference of the Berne Convention.**

(Rome, June 1928)

The Fifth Conference of the Berne Convention was held in Rome from May, 1928 to June 2, 1928. Certain revisions were made to the Berlin Convention and a moral rights clause, (Article 6 bis) was introduced.

**(g) Sixth Conference of the Berne Convention.**

(Scheduled to be held at Brussels, 1935)

Under the Final Protocol of the Rome Convention (June 1928) a conference was scheduled to be held at



Brussels in the year 1935. The conference was adjourned to September 7, 1936; later the conference was adjourned indefinitely for the following reasons:

- (1) The death in January, 1936, of Jules Destree, Minister of Education of Belgium. Destree was in charge of the Brussels Conference; he played an important part at the conference held at Rome in 1928, and was selected to lead the movement for radical changes in the revision to be made at the Brussels Conference.
- (2) A special committee had been assigned to prepare a plan for the unification of the Berne and Pan-American Conventions and to weld all the copyright conventions of the world into a Universal Convention.

The Committee included:

Raymond Weiss, International Institute of Intellectual Cooperation.

Alberto Asquini, former Secretary of State of Italy; International Institute of Rome for the Unification of Private Law.

Stephen Valot, general secretary of the International Federation of Journalists.

Dr. F. Ostertag, director of the Bureau of the International Union for the Protection of Literary and Artistic Works (Berne Convention).

The underlying principles of the following conventions:

- (1) Berne Convention, Berlin, 1908; Rome, 1928;
- (2) Convention of Montevideo, June 11, 1889;
- (3) Convention of Mexico City, June 27, 1902;
- (4) Convention of Rio de Janeiro, August 23, 1906;
- (5) Convention of Washington, December 20, 1907;
- (6) Convention of Buenos Aires, August 11, 1910;
- (7) Convention of Caracas, July 17, 1911;
- (8) Convention of Habana, 1928;

were incorporated by the committee into a convention tentatively called "Purposes of the Universal Convention." This convention is published in *Il Diritto di Autore* (official publication of the Authors' Society of Italy), issue of June, 1936.

(3) To permit the United States to adhere to the Berne Convention.

(4) Unsettled political conditions in Europe.

All four elements were contributing causes to the adjournment, but it is our understanding that the prevailing causes for the adjournment were:

(a) The desire to have the United States enter the Berne Convention and, as a member, to participate in the Brussels Conference.

(b) To weld all copyright conventions into a single unit.

## **2. Attitude of the United States on International Copyright Conventions.**

The United States sent representatives to the conferences held at Berne in 1885 and 1886 but did not become a signatory to any of the documents. The representatives were unofficial observers.

In response to the invitation sent on December 3, 1883 by the Swiss Government, to the United States to participate in a diplomatic conference to discuss and ratify the action taken at the Berne Conference, held in September 1883, United States Secretary of State Frederick T. Frelinghuysen on behalf of the United States replied on January 24, 1884:

" . . . The question of international copyright has for many years attracted the attention of this Government. While disposed in principle toward the proposition set forth that 'the author of a lit-



erary or artistic work, whatever be his nationality and whatever the place of reproduction, should be everywhere protected on the 'same footing as the citizens and subjects of each nation', this Government sees grave difficulties in the way of a general arrangement to embrace all countries in one scheme of copyright protection. The difference of tariffs of the several countries, and the fact that many other industries besides that of the author or artist are concerned in the production and reproduction of a book or work of art, must be borne in mind when considering any plan by which the originator of the work is to be vested with the right to produce or to prohibit its production in all other countries . . . They place an author in a very different position from a painter or sculptor, whose personal handiwork goes upon the market. These points are mentioned not as expressing results reached by this Government, but as the obstacles to the adoption of an international copyright with a country whose tariff differs from our own."

President Arthur in his message of December 1, 1884, in referring to the International Copyright Conference that was held in Berne on September 8, 1884, said

"It is true that Conventions will be necessary for fully accomplishing this result *but until Congress shall by statute fix the extent to which foreign holders of copyright shall be here privileged, it has been deemed inadvisable to negotiate such Conventions.* For this reason, the United States was not represented at the recent conference at Berne."

United States Secretary of State Bayard, in reply to the invitation of the Swiss Government, for the United States to participate in the Conference to be held at Berne September 7, 1885, said on May 21, 1885

"The question of international copyright has been and still is pending in the Congress. *This Government does not feel justified in precluding its free discussion by entering into an international engage-*

*ment in the nature of a formal general treaty as proposed by your Government before the will of Congress in the matter shall have been manifested."*

President Cleveland in his Annual Message to Congress on December 8, 1885 said:

"An international copyright conference was held at Berne in September, on the invitation of the Swiss government. The envoy of the United States attended as a delegate, but refrained from committing this Government to the results, even by signing the recommendatory protocol adopted. The interesting and important subject of international copyright has been before you for several years. Action is certainly desirable to effect the object in view; and while there may be question as to the relative advantage of treating it by legislation or by specific treaty, the matured views of the Berne Conference cannot fail to aid your consideration of the subject."

Secretary Bayard in reply to the invitation of the Swiss Government to the United States to participate in the Conference of September 6, 1886 said:

"All these considerations have necessarily deferred a reply to the invitation of the High Federal Council of November 6, 1885; and the continued pendency of measures in Congress make it, as yet, impracticable for the United States to depute a plenipotentiary to attend. The Government of the United States will take pleasure in instructing its representative at Berne, Mr. Boyd Winchester, to attend as a delegate the conference of September next under the reserve herein indicated. Mr. Winchester will not be empowered to sign the international convention on behalf of the United States, but he will be authorized and instructed to declare to the Conference that the United States, not being parties to the proposed convention, reserve their privilege of future accession under article 18 thereof."

In his message to Congress on December 6, 1886, President Cleveland, in discussing the Berne Conference of September 1886 said:



"This Government did not feel warranted in becoming a signatory pending the action of Congress upon measures of International Copyright now before it".

### **3. The Manufacturing Clause in the American Copyright Act.**

Section 15 of the American Copyright Act provides that every book in the English language, to enjoy copyright protection in the United States, must be printed and bound in the United States with type set in the United States and the illustrations must be processed in the United States; this is known as "the manufacturing clause".

This clause can be traced back to the bill proposed by Senator Henry Clay in 1837, which was the first bill to propose copyright privileges for foreign authors on condition that the books be simultaneously reprinted in the United States. It finally found its way into the Chase Act of March 3, 1891. No copyright legislation in the United States, however, has been enacted extending copyright protection to foreigners without this clause. Since it first appeared in Senator Clay's Bill in 1837, it has been the bone of contention in copyright legislative matters and treaties since that time.

In the petition signed by the twelve American University presidents, it is stated :

"It is still true that, under our law, an author has no redress for piracy if the language of his work is English and the manufacture foreign. . . . Many attempts from the days of Henry Clay onward have been made to change this situation. . . . There has come to be virtually unanimous agreement that the manufacturing clause, as applied to foreigners, should be repealed. . . . The United States is barred from this Union chiefly by the manufacturing clause against foreigners."

### **4. Adherence of the United States to the Berne Convention.**

There are three schools of thought on the adherence of the United States to the Berne Convention.

(a) The immediate adherence of the United States to the Convention. There are many who believe that if the United States adheres immediately to the Convention, it may use its influence and prestige to make satisfactory revisions in the Convention.

(b) To withhold adherence until the Convention is revised. The revised Convention should define the rights that are granted under the Convention and those rights should be enforced in every country of the Convention.

(c) To refrain from joining the Convention at any time. The United States will depend upon reciprocal copyright relations with foreign countries to protect the works of American authors abroad.

*Immediate Adherence of the United States to the  
Convention*

Our State Department is unceasingly urging the immediate adherence of the United States to the Berne Convention as a stimulus to our foreign trade relations. It is the view of the State Department that after its adherence, the United States could successfully urge changes made in the Convention that we think necessary to protect the rights of our authors and exploiters of copyrighted material abroad.

England has been urging the United States to take this step for a number of years, believing that our adherence to the Berne Convention will repeal the printing clause in our law. England believes this clause unfairly discriminates against the works of English authors and has intimated from time to time (prior to World War II) that retaliatory action may be taken by the English Government unless the clause is repealed or modified. Many authors and Societies of Authors believe that adherence to the Convention should take place at once; this so that the work of the author is protected upon creation without formality of any kind.



*Withhold Adherence to the Berne Convention Until the  
Berne Agreement Has Been Revised*

(a) There is a growing sentiment among the creators and users of copyright in Europe that the Berne Convention is outmoded and does not fully serve the purpose for which it was created. The feeling is strong that the convention should be revised so that the rights and obligations are fully and clearly defined in the document and nothing left to the national laws of each country. The rights should be concisely set forth in the convention and these rights should be enforced in every country of the convention; under the present convention, certain rights and remedies are left to the national laws of the countries in which these rights and remedies are claimed.

The leading students of copyright in Europe feel that a drive should be made for a Universal Convention and when the Universal Convention became a fact, the Berne Convention should be abandoned. Mr. DeSanctis of Rome, the official copyright adviser to the Italian Government, expressed the opinion that the establishment of a Universal Convention would be an easier task than to revamp the Berne Convention.

Our adherence to the Berne Convention in the present unsettled condition of the world would not benefit a single lot the American authors and American copyright proprietors. Their rights abroad are as fully protected now under our treaties and reciprocal copyright relations with foreign countries as they would be if the United States adhered to the Berne Convention.

There are practically in existence now four conventions:

(1) Convention of 1886—certain of the countries joined with reservations.

(2) Revision at Paris in 1896—reservations were added.

(3) Revision at Berlin in 1908—reservations added.

(4) Rome Convention in 1928—reservations of three prior conventions might be carried by the signatory countries into the Rome Convention.

(5) At the proposed conference, if and when held, still a fifth convention might be created.

Some of the countries are bound by the convention of 1886, others by the convention of 1896, others by the convention of 1908 and others by the convention of 1928. If the United States adheres at this time, it would be bound by the rules of the Rome Convention of 1928 and would not have the advantages of the reservations made by the other members prior to the Rome Convention.

There is now pending before the Brussels conference whenever it may be held some startling recommendations. These are:

(1) Oral copyright.

(2) Authorship of a film.

(3) Copyright of the rendition and interpretation of performing artists.

(4) Right of privacy in voice for mechanical reproduction.

(5) Right of privacy in likeness and in voice for television.

(6) Right to regulate prices for use of music in case of monopoly.

(7) Right of pursuit by authors.

(8) Copyright in the title as part of the work.

(b) The United States should not enter the Berne Convention until our domestic copyright laws are changed to meet the new conditions which will be brought about by adherence.

If we adhere to the Berne Convention, the adherence would supersede our present Copyright Act or any other



act of Congress which might be in conflict with the terms of the Berne Convention.

Article VI of the Constitution of the United States provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The Berne Convention is a treaty which contains stipulations that are self-executing and upon adherence by the United States, the provisions of the treaty have the force and effect of an enactment by Congress superseding all prior legislation, including the United States Copyright Law, which might be in conflict with any of its terms. (See opinion of United States Attorney General Caleb Cushing, February 16, 1854.)

This would create the utmost confusion and chaos in the field of copyright. Present copyright proprietors would not know the effect the adherence had upon their rights until after long and expensive litigation had been concluded.

The immediate adherence of the United States to the Berne Convention without reservations would take numerous copyrighted works out of the public domain and throw them in the private domain. This will be disastrous to those who have expended large sums of money on public domain works. Some provision should be made in our local laws to give protection to our citizens that may find themselves in this unfortunate position; the United States cannot, at this late date, adhere to the Berne Convention with reservations. Under Article 28, after August 1, 1931, the United States can only adhere to the present Convention.

### 5. Moral Rights of Authors.

There is a tendency now to extend the moral rights clause far beyond its present limitations. It is intended to have the moral-rights clause apply not only to the living authors but also to the dead authors and to works in the public domain.

The doctrine of the moral rights of authors had its origin in France; traces of it may be found in the discussions and writings relating to copyright legislation passed in France in 1791 and 1793, while France was in the throes of the French Revolution. The doctrine was revived some 50 years ago, and since that time has been actively discussed in various countries of continental Europe.

An unsuccessful attempt was made to incorporate the doctrine in a modified form at the Berlin Convention of 1908, and while the doctrine had its origin in France, Italy led the fight for the recognition of the doctrine in the convention at Rome in 1928, where the doctrine was introduced in the following form:

#### *Article 6 bis*

(1) Independently of the author's copyright, and even after transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation, or other modification of the said work which would be prejudicial to his honor or reputation.

(2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed.

It is to be noted that while the doctrine is described in paragraph (1) of article 6 bis of the Rome Convention, nevertheless, it is left to the local laws of each country to enforce this doctrine.



Its inclusion in the convention was the result of a compromise; its effect on the exploitation of copyrighted material was not fully appreciated at that time. The feeling is general now that the doctrine has been carried too far and that it has no place in a copyright convention; in fact, the Incorporated Society of Authors, Playwrights, and Composers of England feels that the paragraph relating to moral rights should be entirely removed from the Berne Convention. On the other hand, France and Italy believe that the principle should be recognized by incorporating it into the conventions with modifications.

Dr. Casselli, of Italy, explained the Italian view on this subject in a communication to the Director General of the Berne Convention.

We believe it is the consensus of opinion now in Europe that there should be a working arrangement between the creators of copyrighted material on the one hand and commerce and industry on the other, so that copyrighted works may be exploited without undue hindrance. It is now conceded that an author or composer should be permitted to bargain away his moral rights and once he accepts a consideration for this bargain and enters into an arrangement he should be held to this bargain in all countries of the convention.

Under the present convention the moral rights of the author are inalienable; he may enforce these rights after he has made an assignment of them for a valuable consideration.

The law of moral rights of authors in France is governed by a law akin to the common law in English speaking countries; there is no statute covering these rights and attorneys in France have stated that they did not know of a single case adjudicated in favor of the author where the author had previously contracted these rights away for a fair consideration.

In the "Pirchard" case (*infra*), the composer, Stravinsky, stated that the publisher did not have the right to

grant permission to record the musical number in the manner in which it appeared in the motion picture.

(a) It was proposed by the Belgian Government to have the Brussels Conference grant even greater protection to the moral rights of authors. It is proposed that the protection of moral rights be continued long after the death of the author and long after the work has fallen in the public domain. It is also proposed to change Paragraph 6 (bis) of the Convention:

'The right to object to every deformation, mutilation or other modification of the said work which may be prejudicial to his honor or to his reputation' to read: 'The right to object to every deformation, mutilation or any other utilization of the said work which may be prejudicial to his honor, to his reputation and to his spiritual and intellectual interests'.

(b) The Board of Trade of England in its Report of the Departmental Committee on International Copyright prepared in 1935 for the use of the English Delegates at the Brussels Conference said:

"Oral evidence directed against these proposals was also given us by representatives of the British film production industry, who submitted that it is frequently essential in the making of a film to alter the story on which the film is based, and that if the author has strong feelings in regard to the form of his work, he can limit the right to alter it in the contract into which he enters for the licensing or assignment of his film rights. These witnesses urged that not only should the Belgian Government's proposed amendments not be adopted, but that the scope of the existing paragraph should be restricted by eliminating therefrom the provision which gives the author the right to object to any distortion, mutilation or other modification of his work which would be prejudicial to his honor or reputation.

We are satisfied from the evidence that the widening of the scope of the author's droit moral



in the way proposed would give rise to difficulties and uncertainties, and we accordingly recommend that these proposals be resisted. We do not think that any attempt should be made to amend the paragraph."

The Belgian Government further propose to extend protection against travesty, deformation, mutilation and other falsification to works that have fallen into the public domain, particularly well known classical works of all countries.

#### **6. Recommendations by the English Board of Trade.**

(a) The English Board of Trade also made drastic recommendations affecting performing rights societies and other monopolies on rights in copyrighted works, as follows:

Each country of the Union may, by its national legislation, provide for the regulation of the exercise of any of the rights covered by this article in respect of so great a number of such works that such person or body of persons is able to, and does:

1. Impose unduly onerous charges or conditions for permission to exercise any such rights; or

2. Unreasonably refuse to grant any such permission; but no such legislative regulation shall prevent the payment of an equitable remuneration for any dealing with such works in any of the ways covered by this article, such remuneration to be fixed, failing agreement, by the competent authority in the country concerned.

For the purposes of the preceding paragraph, a musical or dramatic-musical work shall be considered to include the combination of the music with any words so closely associated therewith as to form part of the same work.

(b) No title of a literary or artistic work may be utilized by third parties to designate another work in any country of the Union in which the first-mentioned work has become so well known under that title that the use of the title for the other work would give rise to confusion between the two works.

(c) The exclusive right of an author to recite his works in public.

(d) A new definition of "published works" to be incorporated in the Berne Convention to meet the decision of the recent *Rohmer* case in Holland (discussed infra).

## 7. Selected Articles—Berne Convention.

### *Article 4* (sub-divisions (1) and (2))

"(1) Authors within the jurisdiction of one of the countries of the Union shall enjoy for their works, whether unpublished or published for the first time in one of the countries of the Union, such rights, in the countries other than the country of origin of the work, as the respective laws now accord or shall hereafter accord to nationals, *as well as the rights specially accorded by the present convention.*

(2) The enjoyment and the exercise of such rights shall not be subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the stipulations of the present Convention, the extent of the protection, as well as the means of redress guaranteed to the author to safeguard his rights, *shall be regulated exclusively according to the legislation of the country where the protection is claimed.*"

### *Article 6*

"(1) Authors not within the jurisdiction of any one of the countries of the Union, who publish their works for



the first time in one of the Union countries, shall enjoy in such Union country the same rights as national authors, and in the other countries of the Union the rights accorded by the present Convention."

*Article 6 bis*—Clause on the Moral Rights of Authors

"(1) Independently of the author's copyright, and even after assignment of the said copyright, the author shall retain the right to claim authorship of the work, as well as the right to object to every deformation, mutilation or other modification of the said work, which may be prejudicial to his honor or to his reputation.

(2) It is left to the national legislation of each of the countries of the Union to establish the conditions for the exercise of these rights. The means of safeguarding them shall be regulated by the legislation of the country where protection is claimed".

*Article 18*

"(1) The present Convention shall apply to all works which, at the time it goes into effect, have not fallen into the public domain of their country of origin because of the expiration of the term of protection.

(2) But if a work by reason of the expiration of the term of protection which was previously secured for it has fallen into the public domain of the country where protection is claimed, such work shall not be protected anew."

HOLLAND

Holland has been reluctant to give protection to the works of American authors unless the works were first published in Holland. The attitude of Holland is not surprising; that country has never been very strong for copyright, either domestic or international, although Hol-

land went through the formalities of enacting copyright legislation and arranging for reciprocal copyright relations with the United States.

Holland adopted a Copyright Law on June 28, 1881. It appears that little or no attention was paid to the Law; it was seldom, if ever, used by litigants. On February 23, 1893, William E. Quinby of the United States Legation at The Hague sent a letter to the United States Secretary of State, Gresham, in which he stated that on three occasions (May 19, 1891, January 11, 1893 and June 3, 1893) official notes were addressed to the Netherlands Government. A conference was had recently with the Minister of Foreign Affairs on protection in Holland of works of American authors. Quinby stated:

"In my last interview with the Minister of Foreign Affairs, His Excellency said that there existed no copyright whatever in this country, public opinion being averse thereto, and hence the prospects of international copyright law were very slight indeed".

On December 13, 1897, Stanford Newel of the United States Legation at The Hague wrote to John Sherman, Secretary of State. He enclosed three copies of the Copyright Law of Holland of June 28, 1881. Article 10 of the law reads as follows:

"Author's rights in regard to any work made public by printing shall lapse, if, within one month of the date of issue, the author, publisher or printer does not send two copies of that work with his personal signature, his domicile and the date of publication on the title page, or failing such, on the cover of the work, to the Department of Justice, as regards translations with due observance of the period stipulated in art. 5b.

"The above mentioned copies shall be accompanied by a declaration from the printer stating that the work was printed at his establishment within the Kingdom".



Newel added that the copyright situation in Holland had not changed since the note of William E. Quinby of February 23, 1895.

Between December 13, 1897 (when Newel wrote to Sherman) and October 31, 1899, Holland modified its point of view, for on that date (October 31, 1899) Newel wrote to John Hay, Secretary of State, enclosing correspondence that passed between the United States Legation at The Hague and the Foreign Office at The Netherlands. Commenting on a note, dated August 15, 1899, from the Minister of Foreign Affairs in Holland, Newel said:

"It will be observed that His Excellency states that The Netherlands Law makes no distinction whatever between the rights of the citizen and the foreigner in the matter of copyright, provided the work be printed and published in The Netherlands or in the Netherlands Indies; and that in case of works that do not issue from a printing office, the law requires that the author of the same shall be domiciled in the country or its Indies—no matter whether he be a Dutch citizen or a foreigner. Hence, His Excellency, concludes that the rights of both American and Dutch citizens are the same in the matter of copyright".

On November 22, 1899, Secretary of State Hay wrote to Newel, stating that Holland had complied with Section 13 of the United States Copyright Act of March 31, 1891 and that the President had issued a Proclamation, dated November 20, 1899, with respect to the subjects of the Netherlands.

On September 23, 1912, Holland revised its copyright law to enable that country to join the Berne Convention; it joined the Berne Convention in 1914.

On June 7, 1922, Louis Sussdorff, Jr., Charge d'Affaires at The Hague, wrote to the Secretary of State:

"I have just received a formal assurance from the Foreign Office that American citizens are now ex-

tended the benefits of Dutch copyright legislation in the Netherlands on the same basis as Dutch subjects and that in effect the same rights are now granted to authors by the laws of the Netherlands as by the laws of the United States . . . . No formalities other than the placing of the author's name upon his work are necessary in order to secure copyright protection in Holland".

On February 26, 1923, a Proclamation was issued by the President of the United States granting reciprocity on mechanical rights in the United States to the nationals of Holland.

It was presumed that reciprocal copyright relations existed between the United States and Holland (based on the Presidential Proclamations of November 20, 1899, April 9, 1910 and February 26, 1923) when the DADDY LONG LEGS case (discussed *infra*) was instituted in 1938.

The Dutch Minister of Foreign Affairs took a special interest in the case and caused an investigation to be made on the reciprocal copyright relations claim. It was claimed by the Dutch Government that the reciprocal copyright relations were cancelled on November 2, 1926 by a note from the Netherlands Government sent to the United States Government on that date. In the Summer of 1940, there was discovered in the Dutch Embassy at Washington a note, dated November 2, 1926, cancelling the reciprocal copyright relations between the two countries. On the back of the note was endorsed a statement that a copy of the note had been delivered to the "Solicitor General of the State Department" on November 2, 1926. There is no record in the Department of State or in the Office of the United States Solicitor General showing that the memorandum had been delivered; until the Summer of 1940, our Government had no knowledge that the copyright relations between the two countries had terminated.

Notwithstanding the cancellation by The Netherlands of its reciprocal copyright arrangement with the United



States on November 2, 1926, The Netherlands is listed as one of the countries in which the works of American authors are protected by reciprocal copyright relations in "Copyright Law of the United States of America". Bulletin No. 14, issued by the Copyright Office in 1942.

The attitude of Holland on protection to the works of American authors is reflected in recent litigation in that country in the following cases:

1. Sax Rohmer (A. H. Sarsfield) versus "De Combinatie"

Work involved: "THE DAUGHTER OF FU MANCHU"

2. Margaret Mitchell Marsh versus Zuid-Hollandsche Boeken Handeldrunkkery, *et al.*

Work involved: "GONE WITH THE WIND"

3. Twentieth Century-Fox Film Corporation versus Neerlandia Film Productie Maatschappij

Work involved: "DADDY LONG LEGS"

#### The Sax Rohmer Case—"THE DAUGHTER OF FU MANCHU"

Sax Rohmer (Arthur H. Sarsfield Ward) is a citizen of England. He wrote a story entitled "THE DAUGHTER OF FU MANCHU"; the story was originally published in Collier's National Weekly. Collier's National Weekly is printed in Springfield, Ohio, U. S. A., and is published simultaneously in Canada by copies offered for sale to the Canadian public on the same day the copies are offered for sale in the United States. All the copies are printed in the United States and distribution is made in Canada by a firm who distributes periodicals and other literature.

The defendant, De Combinatie, made an unauthorized publication in Holland of a Dutch translation of the story. Rohmer brought an action for infringement under Article 4

of the Berne Convention, claiming that simultaneous publication in the United States and Canada gave the story copyright protection in Holland.

The Cantonal Court at Rotterdam on November 3, 1933 declared in favor of Rohmer and awarded him damages in the sum of 165 Dutch Gulden. An appeal was taken to the National Court. On April 29, 1935 the National Court reversed the decision of the Cantonal Court and held that since Collier's National Weekly was printed in Ohio, it was, therefore, published in the United States; the distribution and the simultaneous offering for sale in Canada did not, the court held, constitute publication within the meaning of the Berne Convention and hence, the story was not entitled to Berne Convention protection in Holland.

An appeal was taken to the Hooge Raad, the highest court of Holland. On June 26, 1936 this court dismissed Rohmer's complaint and affirmed the decision of the National Court.

The decision is based upon a definition of the phrase "*les oeuvres editees*" taken from Paragraph 3 of Article 4 of the Berne Convention. These words are translated in the official English text as "works, copies of which have been issued to the public". The Holland court has decreed that the word "editees" means more than a mere issue of copies of a work to the public and that the words of the English text do not convey the full meaning expressed by the French word—*editees*.

The Court distinguished between "publication" and "distribution" and stated that a distributor was not a publisher within the meaning of the Berne Convention—"the distributor" must do more than act as a mere distributing agent for a foreign publisher.

E. J. MacGillivray stated:

"The distribution of the periodical in Canada was clearly sufficient to constitute first publication in

Canada within the meaning of the British Act and to secure copyright throughout the British Dominions".

For criticism of this case by E. J. MacGillivray, see:

"The Author, Playwright and Composer", Vol. XLVI, No. 3, Spring 1936, page 323.

MacGillivray's Copyright Cases, 1936, pages 78-79.

To modify the effect of this decision, the English Board of Trade in its Report of the Departmental Committee on International Copyright, issued in 1935, for use at the proposed Belgium Conference, made the following suggestion:

"That a work shall be considered to have been published in a country if copies of the work have been made available to the public in that country, provided that there is at the time a bona fide intention on the part of the publisher to supply any demand for the work by the public in that country if and when such demand shall arise".

"Simultaneous Publication" shall be defined as follows:

"A work shall be considered to have been published simultaneously in two countries if publication in one country has taken place not more than fourteen days after publication in the other country".

The Margaret Mitchell Case—"GONE WITH THE WIND"

Plaintiffs alleged that Margaret Michell was the author of a novel entitled "GONE WITH THE WIND" which was simultaneously published on June 30, 1936 at Toronto, Canada, and in the United States.

Defendants made a Dutch translation of the story and published it without the consent of the plaintiffs.

Plaintiffs alleged infringement and claimed copyright protection in Holland because of simultaneous publication of the novel in a Berne Convention country. (Prior to the institution of this action, plaintiff, Margaret Mitchell,



sought to obtain relief by summarily seizing the infringing works. The warrant of seizure was vacated and on appeal, the decision of the lower court in vacating the warrant was affirmed.)

The Court held that publication in Canada by The McMillan Company of Canada was not publication within the meaning of the Berne Convention.

The Court of Appeal at the Hague, on May 6, 1940 affirmed the decisions of the lower courts. On May 23, 1941, the Hooge Raad (Supreme Court of the Netherlands) reversed the lower courts and held that the defendants had infringed the plaintiff's work "GONE WITH THE WIND". The Court held that the facts alleged by the plaintiff, showed publication in Canada as provided by the Berne Convention, and that the laws of Holland must protect the work.

The case was remanded to the lower courts to be dealt with in accordance with the decision of the Hooge Raad (the Supreme Court).

The occupation of Holland by Germany has interrupted the work of the courts—the case is still pending.

Twentieth Century-Fox Film Corporation versus  
Neerlandia Film Productie Maatschappij—  
"DADDY LONG LEGS"

Twentieth Century-Fox Film Corporation owns the worldwide silent, sound, dialogue and talking motion picture rights in and to the novel and play DADDY LONG LEGS, written by Jean Webster.

Neerlandia Film Productie Maatschappij of Amsterdam, Holland, has produced a picture for distribution in Holland entitled VADERTJE LANGBEEN based upon this work without first obtaining the consent of Twentieth Century-Fox Film Corporation.

Twentieth Century-Fox Film Corporation has instituted an action in Holland against Neerlandia Film

Productie Maatschappij for the production and exhibition of the motion picture VADERTJE LANGBEEN on the ground that the novel DADDY LONG LEGS is protected in Holland since:

(1) The novel, DADDY LONG LEGS had simultaneous publication in England and publication in the United States and is, therefore, entitled to protection in Holland under the Berne Convention.

(2) That under reciprocal copyright relations between the United States and Holland, both the novel and the play DADDY LONG LEGS are entitled to copyright protection in Holland.

(3) That the defendant is guilty of unfair competition and "immoral procedure."

Willy Hoffman, a recognized European authority on copyright and copyright adviser to the German Government was engaged by the plaintiff to prosecute the case. In the meantime, Hoffmann died and the German Government took complete control of Holland; the case was left in status quo. It is believed that when The Netherlands Government again functions, the plaintiff's action will be sustained.

In this action, it was revealed to the United States for the first time that Holland had cancelled its reciprocal copyright relations with the United States on November 2, 1926. It was also revealed that attorneys in Holland, and in fact in Europe, were unfamiliar with reciprocal copyright relations between the United States and foreign countries and it seemed incredible to them that the question was not raised before.

Our State Department has used the attitude of Holland on the protection of American works as a convincing argument that the United States should immediately adhere to the Convention to give protection in Holland to American authors. Margaret Mitchell, author of "GONE WITH

THE WIND", and Marjorie Kinnan Rawlings, author of "THE YEARLING", filed protests with the United States Senate Committee on Foreign Relations against piracy of their works in Holland and urged immediate adherence to the Berne Convention.

Miss Rawlings stated:

(1) March 26, 1939—The Dutch infringing publisher wrote her:

"That the blame lay only in the deplorable aloofness of the United States in relation to the Berne Convention".

(2) April 19, 1941—

"To my protests the Dutch publishers replied that they had no obligation because of the refusal of the United States to cooperate internationally".

In the Sax Rohmer case, the Judge of the Cantonal Court commented on the fact that the United States did not join the Berne Convention.

See:

Senator Thomas' Report, February 16, 1941, Executive Report No. 1 on International Copyright Convention, pages 18-19.

Hearings . . . Executive E, 73rd Congress, on the International Convention . . . April 15, 17, 1941, page 113.

### *Pitfalls in Interpreting the Berne Convention*

Article 4, subdivision (1) and (2) of the Convention reads as follows:

"(1) Authors who are nationals of any of the countries of the Union shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws do now or may hereafter grant to natives, as well as the rights specially granted by the present Convention.



(2) The enjoyment and the *exercise of these rights shall not be subject to the performance of any formality*; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, a part from the express stipulations of the present Convention, the extent of protection, as well as the means of redress secured to the author to safeguard his rights, *shall be governed exclusively by the laws of the country where protection is claimed.*"

It is plain that the Convention states that the work of an author of one country will be protected in another country, without formalities. It is also plain that (Article 4, subdivision 2),

"the extent of the protection as well as the means of redress . . . shall be governed exclusively by the laws of the country where protection is claimed."

To illustrate the point that the rights of authors of Berne Convention countries depend to a large extent upon how those rights are enforced in the country in which a claim is made, I call your attention to an incident that occurred in the hearings before Senator Thomas on April 15, 1941.

In the Hearings before Senator Thomas, sitting as a Subcommittee of the Committee on Foreign Relations of the United States Senate, held April 15 and 17, 1941, I made the statement that Spain and Italy required a formality (registration and deposit) for the protection of foreign works.

Stephen P. Ladas (author of "The International Protection of Literary and Artistic Property", in two volumes, New York, 1938) filed serious objection to the statement and stated emphatically that that was not the law. I quote from the proceedings:

Page 42 "Mr. Ladas. If I may be permitted to say so, that statement of Mr. Kilroe is not correct. . . . The convention strictly and definitely provides

that the protection of copyrights of authors claiming the benefits of the convention is free of any condition of formality."

Page 48 "Now, much of the discussion about this international convention, the Berne Convention, arises, I believe from a confusion or misunderstanding with regard to the provisions. You had a perfect example just a few minutes ago when Mr. Kilroe and I disagreed on a matter which seems to me essential, how far the convention relieves American authors of complying with formalities . . . That point is definitely clear, that when a party claims the protection of the convention he does not have to comply with any formality or conditions in any country, and may sue directly upon the creation of his copyright."

On April 17, 1941, Dr. Waldo G. Leland, Chairman of the Committee for the Study of Copyright, presented to Chairman Thomas a letter from Mr. Ladas. In presenting the letter, Dr. Leland said: (page 182)

"Mr. Ladas points out, that the formalities now required under Italian law for the copyright of American works are required because the copyright relations between the two countries are under the regime of Presidential proclamation and not under the regime of the Convention of Berne. As Mr. Ladas states in his letter if the relations were governed by the Convention of Berne, the formalities referred to would not be required."

Mr. Ladas in a letter dated April 16, 1941, to Senator Thomas stated (pages 182-183):

"I beg your permission to make two points in connection with the discussion of yesterday.

"I do not think it has been made clear that the position of American copyright owners at the present time under the regime of Presidential proclamations presents the following important aspect. At the present time, American copyright owners are entitled in proclaimed countries to the

protection granted to nationals of these countries under their law. This means, particularly, two things:

“(1) American nationals must comply with any formalities imposed by domestic law in proclaimed countries as their own nationals.

“Haiti, Spain, and Siam require compliance with local formalities as a condition to acquisition of copyright (deposit and registration).

“Bulgaria and Greece require notice in respect of some works.

“France requires deposit as a condition to instituting infringement proceedings.

“Italy requires recordal of assignments.

“All these formalities are done away with under the convention and persons claiming the benefit of the convention are not required to comply with any of these formalities.

“(2) American nationals are limited to the protection of the national law in the proclaimed countries and cannot claim the broader protection of the convention. To mention only one example.”

It is true that the Berne Convention requires protection of works in all Berne Convention countries without formalities of any kind. One would ordinarily think that this provision would be carried out in all Berne Convention countries. Experience shows to the contrary.

No country in the world gives better protection to the works of foreigners than it does to the works of its own Nationals. England made this mistake in 1886 when it first joined the Berne Convention; England required its own Nationals to make entries and deposits in Stationer's Hall. England did not require works of authors of Berne Convention countries to follow these formalities. However, this was later corrected by England.

Under reciprocal copyright relations between the United States and foreign countries, the works of an Amer-



ican author is protected in the country with which the United States has copyright relations the same as the work of a National of that country; and Nationals of Berne Convention countries did not enjoy a greater right in that country.

Mr. Ladas is in error when he states that France requires deposit as a condition to instituting infringement proceedings. This requirement was abolished in May 19, 1925.

## SPAIN

Article 36 of the Spanish Copyright Law reads:

"To enjoy the benefits of this law it is necessary to have recorded the right in the register for intellectual property, in accordance with provisions in the foregoing articles."

Article 38 of the Spanish Copyright Law reads:

"Any work not recorded in the Register of Intellectual Property may be published or reprinted by the government, scientific institutions, or individuals during a period of ten years, reckoned from the date on which the right to register same terminated."

I made inquiry to Mentha, the Director of the Berne Convention, if the works of members of the Berne Convention countries were protected in Spain without formality. He replied that the Berne Convention required protection without formality of any kind, but since the Courts in Spain declined to protect the works of foreign authors where registration did not take place, he, as Director of the Berne Convention, generally advised authors of Berne Convention countries to respect the formalities set up by the Spanish law.

## ITALY

Section 58 of the Italian Copyright Law reads as follows:

"The author of an intellectual work or other interested parties must file a copy of the work in accordance with the rules and regulations in this respect with the Patent Office at the Ministry of National Economy. Failure in this regard does not prejudice the rights recognized as belonging to the author by the present decree nor form any obstacle to the exercise of such rights. A fine of not less than 50 lire will be inflicted in addition to the seizure of one or more copies of the work in the possession of anyone."

This provision applies to the works of authors of Berne Convention countries as well as to the works of authors of countries in which reciprocal copyright relations with Italy exists and it also applies to the works of Italian Nationals. This statement is made upon the advice of Mr. De Sanctis.

*Cessation of Activities on the Immediate Adherence of the United States to the Berne Convention.*

Beginning with March, 1934, the State Department has made a strenuous effort to have the United States immediately adhere to the Berne Convention. The objections filed by the users and exploiters of copyrighted works checked these efforts. On January 16, 1941, a Subcommittee of the Committee on Foreign Relations made a report recommending that the United States immediately adhere to the Berne Convention. The report provided:

"In order that there may be time for adjustments, considered desirable or necessary in some quarters, before the convention becomes operative in this country, it is further recommended that, in accord-

ance with Article 25, paragraph (3) of the convention the day for its entry into force as to the United States be fixed at 1 year from the date of its approval by the Senate”.

Extended hearings were held on this report before Senator Thomas sitting as a subcommittee of the Committee on Foreign Relations on April 15 and 17, 1941. With the exception of the State Department and a few minor groups, it was the consensus of opinion that no action should be taken until war conditions had settled in Europe. In December, 1941, the United States became engaged in World War II and the activities for the adherence of the United States to the Berne Convention ceased.

## II. RECIPROCAL COPYRIGHT RELATIONS BETWEEN THE UNITED STATES AND FOREIGN COUNTRIES

The Copyright Act of March 3, 1891 (Revised United States statutes sections 4952, 4967) for the first time provided for reciprocal copyright relations with foreign countries.

The Act of March 3, 1891 provided:

“This act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on *substantially the same basis as to its own citizens*; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the President of the United States by Proclamation made from time to time as the purposes of this act may require.”



Copyright Act of 1909 provides:

"Section 8. . . . Provided, however, That the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of *copyright on substantially the same basis as to its own citizens*, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require."

United States enjoys copyright reciprocity, either by Treaty or by Reciprocal Copyright relations with practically every important country in the world; The Netherlands however, in a furtive way, severed Reciprocal Copyright relations with the United States November 2, 1926 (*supra*).

A list of the Presidential Proclamations on Reciprocal Copyright Relations will be found in "Copyright Law of the United States of America," Bulletin No. 14, issued by the Copyright Office, 1942, pages 44-45.

## (A) France

### 1. The French Conception of Copyright.

(a) *The basic principle of the French Copyright Law* came into being during the French Revolution; the rallying cry of the Revolution was:

*Equality, Fraternity and Humanity.*

In the Jacobean enthusiasm for the brotherhood of man, France passed Copyright laws giving copyright protection in France to the works of all Foreign Authors, if the works were protected in the country of origin (or in any country of the world). This is the plain intention of the French copyright laws—and the theory upon which the Laws are based; a broad but sound recognition of the right of intellectual property.

Under the French concept of copyright, a work of art or of literature is a part of the personality of the author, from which the work cannot be separated. Thus if the work is *alive* (that is, protected at its creation in any country of the world), it is protected in France for the term prescribed by the French Law. The copyright is inherent in the person of the author and is inalienable.

The French Convention of 1793 was hostile to private property. Nevertheless, LeChapeliter, in reporting the Laws or Decrees of 1793 to the Convention, said:

“The most sacred, the most unquestionable and the most personal of all properties is the work, fruit of the thought of a writer.”

Another speaker (M. Lakanal) at this Convention said that Literary Property (Copyright) was the least calculated to injure Republican equality or to affront Liberty.

It is my opinion that as soon as a work of Art or Literature is created in the United States (or elsewhere), it is protected in France even in the absence of Treaty or

Reciprocal Copyright arrangements. I realize that this theory seems unorthodox to many, and that it has been censured and condemned by a few students of Copyright; nevertheless I believe it is a sound doctrine and I have been unable to find any rule to the contrary in French legislation or in French Jurisprudence.

(b) *United States has had reciprocal Copyright relations with France since 1891.*

On January 5, 1940, I sent the following opinion to the American Embassy in Paris on Protection of the Works of American Authors in France. The opinion discusses in full the theory of protection under Reciprocal Copyright relations.

"I read with interest the memorandum on the Decree of March 28, 1852 prepared by the Societe des Gens de Lettres.

"While I have the greatest respect for the opinions on copyright and literary matters issued from the Societe, I am positive they are in error on this point. The Societe seems to have completely missed the principle of reciprocity on which the claim for protection is based; the protection and the term thereof do not depend upon the Decree of March 28, 1852 or any of the rules or decisions flowing from the Decree; the protection and its term depend upon the reciprocal copyright relationship between the United States and France.

"The Copyright Law of the United States passed March 3, 1891 (effective July 1, 1891 and known as the Chace Act) permitted for the first time, under certain conditions, copyright protection in the United States to the works of foreign authors; the basic condition is that the United States will grant copyright protection to the works of authors of a foreign country on the same terms and conditions as it grants copyright protection to the works of American authors if that foreign country grants protection to the works of American authors on the same terms as is enjoyed by the nationals of that country.



"On May 25, 1891, the French Minister to the United States assured the Department of State of the United States that the works of American authors were given protection in France 'identical with' the protection given to the works of French authors. Relying upon this assurance, President Benjamin Harrison on July 1, 1891, issued a proclamation announcing to the world the reciprocal copyright relations between the United States and France. Relying on identical assurances from the French Government, a similar proclamation was issued by President William Taft on April 9, 1910 under our present Copyright Law which was passed on March 4, 1909; President Woodrow Wilson issued a proclamation on May 24, 1918 concerning the mechanical reproduction of music.

"Under this relationship, the works of American authors are in reality under the French Law considered as the works of French authors and thus entitled to the identical protection that is enjoyed by the works of French authors, including the full term of copyright protection. The term of protection for the works of French authors in France is fixed at fifty years after the death of the author (plus six years and one hundred fifty-two days for World War I period); this term continues in France regardless of the fact whether or not the work is in the public domain in a foreign country, say the United States; and since under the reciprocal arrangements, the works of American authors become in France (by a fiction of law) the works of French authors, these works (works of American authors) are entitled to the same protection (as enjoyed by the works of French authors), to wit, fifty years after the death of the author (plus the war period) and this regardless of the fact whether or not the work fell in the public domain in the United States or any other country foreign to France.

"For some unknown reason, the reciprocal copyright relations between the United States and foreign countries appear to be little known in European countries.

"I am not unmindful of the fact that well known students of copyright in France have expressed an opinion contra to my views on this point; their reasoning, however, does not seem convincing. They state that as a matter of public policy, France would not grant protection to the works of foreigners for a term longer than that granted to the works of French authors and that France has never asked by treaty or otherwise protection for the works of a French author in any foreign country for a term of longer duration than that granted by the French Law. Assuming that the Public Policy of France is correctly stated by these students, it does not follow that the work of a foreigner will not be protected in France for a period longer than that of the country of origin of the work, to wit, for the same period of protection that is granted in France to the work of a French author; at least this is my interpretation of the effect of the Bessel case.

"In the representations made by the French Government to the United States, when copyright protection in the United States was sought for the works of French authors, there is not a word either directly or by implication that would indicate that the works of American authors would not be protected in France for the same period as works of French authors; if there was to be any limitation on the term of protection in France, it is safe to assume that the French Government would have stated its limitations in its representations to the United States.

"In passing, I call your attention to the last paragraph of the Societe's note which reads as follows:

"'Even if all these conditions are fulfilled, the decree of 1852 in any case is applicable in France only if the legal deposit of the work has been effected in France (Article 4 of the decree)'.

"Again the Societe is wrong; this formality was wiped out by the French Law of May 19, 1925. Under this Law, deposits of copies are no longer condition precedent to the starting of an action

for infringement nor does the failure to make the deposit affect the validity of the copyright. Under the Law, the printer and the publisher are each required to deposit copies of the work; in the event of failure to do so, the printer or the publisher or both are subject to substantial fines but the author's copyright is not jeopardized in any way by the failure to make the deposit. A number of countries, including England, have laws requiring deposits of copyrighted works but the requirement for the deposit does not in any way affect the validity of the copyright in the works."

## 2. Moral Rights of Authors.

This subject is discussed under the heading, Berne Convention.

*Case based on the Moral Rights of Authors:*

*Igor Stravinsky vs. Societe Anonyme Warner Bros., First National Films, Civil Tribunal of the Seine, 3rd Chamber, Paris, July 27, 1937.*

Stravinsky composed a musical work entitled "L'OISEAU DE FEU" (THE FIREBIRD). The defendant produced a picture entitled "OISEAU DE FEU" (THE FIREBIRD).

Zilahy, a Hungarian composer, wrote and produced a play under the title "TUZMADAR" or "FIREBIRD" (Hungarian and English translations of "OISEAU DE FEU"). Warner Brothers purchased the motion picture rights to Zilahy's play and obtained from the publisher of Stravinsky's work "THE FIREBIRD" the right to synchronize portions of the number in the motion picture "THE FIREBIRD". Stravinsky's music was played only four minutes. Part of the music was used as the motif of the "Infernal Dance" placed at the end of the ballet. The plaintiff claimed that this use of the music served as the motif of seduction. Stravinsky's music was also played while the names of the cast were thrown on the screen and was im-



mediately followed without interruptions, by musical phrases of a Viennese number written by Kahn.

The Court held that the publisher of Stravinsky's work did not have the right to authorize such changes in the music and that it was a violation of the moral rights of the author. The defendants were fined 1 franc and costs because of the technical nature of the complaint. Reference is made in the opinion to the moral rights clause in the new proposed French Copyright Law.

### **3. Term of Copyright in France.**

Law of 1793—Life of the author and 10 years after death.

Law of 1866—Life of the author and 50 years after death.

Law of 1919—Because of World War I, 6 years and 152 days were added to the term of 50 years after the death of the author.

### **4. Revision of the French Copyright Law.**

Copyright Law proposed in 1936 by Jean Zay, Minister of Education.

### **5. References:**

Laws:

- (1) 1791, January 13-19, July 19, August 6—Deals with public performance.
- (2) 1793, July 19—Provides that the authors of writings of all types, composers of music, architects, sculptors, painters and designers who shall have engraved pictures or designs shall enjoy the exclusive right to sell or to distribute and to transfer in whole or in part.

- (3) Laws of:  
 Feb. 5, 1810 } Works of foreign authors protected  
 Aug. 3, 1844 } in France the same as the works of  
                     French authors.
- (4) 1852, March 28, Decree — Gives protection in France to the works of foreign authors, if the work is protected in the country of origin.
- (5) 1925, May 19—Relates to Deposits.
- (6) Penal Law.  
 Sections 425, 426, 427.
- (7) *Des Droits d'Auteurs*. By Renouard (Paris, 1838).
- (8) *French and Foreign Law on Literary and Artistic Properties*. By Lyon-Caen and Paul Delalain (Paris, 1889).
- (9) *The Usurpation in Literary and Artistic Matters*. By J. Labaurie, LL.D. (Paris, 1919).
- (10) *The Moral Right of the Author in his Artistic or Literary Work*. By Stanislas De Gorguette D'Argoeuves (Paris, 1926).
- (11) *The International Protection of Literary Works*. By Pierre Monnet (Paris, 1929).
- (12) *The moral Right of the Author*. By Georges Michelides-Nouaros (Paris, 1935).
- (13) *The Bessel Cases*. Works of Rimsky-Korsakoff; and Moussorgsky. Soviet Union Decree of Confiscation of 1919 not recognized in France.  
     *Bessel et Cie v. Societie des Auteurs et Compositeurs Dramatiques*.  
     City Tribunal of the Seine, Paris.  
     *Gazette des Tribunaux*, February 22-26, 1931.

Societe Bessel et Cie, Societe des Editions Salabert v. Societe des Auteurs, Compositeurs et Editeurs de Musique.

Gazette des Tribunaux, January 21, 22, 23, 1934.

For discussion of the Bessel cases see Droit d'Auteur, March, 1931, 1934.

## (B) Canada

### 1. The Canadian Copyright Act of 1921 became effective on January 1, 1924.

Sub-division 2 of paragraph 4 of the Act provides:

"If the Minister (Canadian Minister of Trade) certifies by notice, published in the Canada Gazette, that any country which has not adhered to the Convention and the Additional Protocol thereto, set out in the Second Schedule to this Act, grants or has undertaken to grant, either by treaty, convention, agreement or law, to citizens of Canada the benefit of copyright on substantially the same basis as to its own citizens or copyright protection substantially equal to that conferred by this Act, *such country shall, for the purpose of the rights conferred by this Act, be treated as if it were a country to which this Act extends*; and it shall be lawful for the Minister to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, under the law of such country, differ from those in this Act."

On Dec. 26, 1923. The Minister of Trade and Commerce of Canada (Thomas Andrew Low) certified:

"that the United States of America is a country which grants or has undertaken to grant either by treaty, convention, agreement or law, to citizens of Canada, the benefit of copyright on substantially the same basis as to its own citizens or copyright protection substantially equal to that conferred by



*the said Act, and from the first day of January, 1924, the said country shall for the purpose of the rights conferred by the said Act be treated as if it were a country to which the said Act extends."*

**2. The works of American authors enjoy copyright protection in Canada as follows:**

(1). All works, published or unpublished, created in the United States after Jan. 1, 1924 are protected in Canada as soon as the work comes into being without formality of any kind or type.

(2). All works of American authors published in Canada simultaneously with the publication in the United States, if protected in Canada on Jan. 1, 1924, enjoys protection in that Country during the life of the author and 50 years after death.

(3). Works of American authors first published (or simultaneously published) in a Berne Convention Country enjoy protection in Canada for a term of 50 years after the death of the author.

All the works of American authors that enjoy copyright protection in Canada are protected in that country for a term of 50 years after the death of the author, and the protection extends for this period, even if the term of copyright has expired in the United States.

**3. Compulsory Licenses.**

The Canadian Copyright Act contains provision for compulsory licenses for the printing or performances of specific literary works under a formula for royalties described in the Act.

(a) *Section 13* provides that after the death of the author of the literary, dramatic or musical work, if the copyright owner withholds the work from the public by refusing to republish it or to produce it

in public, the Governor in Council may order the owner to grant a license for the republishing of the work or the public performance of it as the case may be.

(b) *Section 14*: Provides that the Minister may grant a license to print and publish in Canada any book that enjoys copyright in Canada when the owner fails;

(a) to print the book in Canada and

(b) to supply copies of the book so printed in sufficient quantity to meet the reasonable demands of the Canadian market.

(c) *Section 15*: License to publish a book in serial form. If the book is published in serial form outside of the English Dominions or outside a foreign Country to which the Canadian Copyright Act extends, the Minister may grant a license to any Canadian publisher of a periodical to publish the book in serial form.

#### 4. Amendments.

On June 11, 1931, Canada passed two important amendments to its Copyright Act:

(1) The title of a work was protected the same as the work

“when such title is original and distinctive”

The effect of this amendment was practically destroyed by the Lords of the Judicial Committee of the Privy Council in Oct., 1939.

In the case of *Francis Day and Hunter Limited v. Twentieth Century Fox Company Ltd.*

1940 Appeal Cases 112

Times Law Reports Oct. 20, 1939

(1937) 4 Dominion Law Reports 700

Ontario Supreme Court Nov. 23, 1937.  
 (1938) 3 Dominion Law Reports 376  
 Ontario Court of Appeal June 13, 1938

The defendant Twentieth Century Fox Company Ltd. released in Canada a talking motion picture under the title "THE MAN WHO BROKE THE BANK AT MONTE CARLO". There was a well known song under the title "The Man Who Broke The Bank At Monte Carlo". The defendant used only the Title; it did not record in the Motion picture the music or the words of the song. The plaintiff Francis Day and Hunter Ltd., the owner brought an action charging the defendant:

(1) with copyright infringement for the use of the title on the ground that the title of the song under the Amendment to the Canadian Copyright Act of 1931 was protected as part of the song; that the infringement was based on the fact that the title was flashed on the screen and hence performed.

(2) with unfair competition ("Passing Off") on the use of the title.

The Court held:

(a) "It is idle to suggest here that by anything the respondents have done they have performed the song in any sense. . . . Not a word of the song is repeated in any form except that the title is thrown on the screen at the outset . . . but to say that this bare fact was a public performance of a musical composition is abhorrent to common sense".

(b) "The copying which is complained of is the use of the title, and that is too unsubstantial in the facts of this case to constitute an infringement. The appellants' contention was put as high as that copyright in a title is infringed by the application of that title to a work of a different character from that of the work to which it was originally applied . . . On this reasoning it would be said that the title



'Adam' applied to a work of statute would be infringed if that title were used as that of a movie novel. These and other anomalous consequences justify the broad principle that in general a title is not by itself a proper subject matter of Copyrights as a rule a title does not involve literary composition and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale and of so important a character as to be a proper subject of protection against being copied". . . . Under the definition (v) (Section 2 of the word "work" Canadian Copyright Act as amended in 1931) "Work shall include the title thereof when such title is original and distinctive. This does not . . . mean that the title of a work is to be deemed to be a separate and independent work . . . the result is that to copy the title constitutes infringement only when what is copied is a substantial part of the work."

(c) On the unfair competition charge the Court said:

"The member of the public who is supposed to be likely to be deceived, must, to start with, be assumed to know what he was wanting to see or hear. Thus in the present case he must be presumed to know that what he wanted was to hear the song 'The Man Who Broke the Bank at Monte Carlo'. It seems inconceivable that when or if he bought a ticket for the motion picture, he imagined he was going to hear a performance of the familiar song. The two things are completely different, and incapable of comparison in any reasonable sense. The thing said to be passed off must resemble the thing for which it is passed off. . . . There was no hint that the song was going to be sung. Indeed it was not sung at any performance. If it had been sung . . . if that were possible, it would have made the claim for passing off even more preposterous, because the assumed victim would have got what he desired, namely, a performance of the song."

(2) A clause on the moral rights of authors was added:

“Independently of the author’s copyright, and even after the assignment, either wholly or partially, of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation.”

This amendment was passed pursuant to subdivision (2) of Article 6 Bis of the Berne Convention as formulated at Rome in June 1928.

(3) April 17, 1935 the Canadian Copyright Act was amended to regulate the royalties to be charged by Performing Rights Societies in Canada. Under this amendment the Performing Rights Societies are required to file with the Minister or the Copyright Office.

(a) A list of all musical works in which performing right is claimed.

(b) A statement of royalties to be collected for the public performance of the works.

The schedule of royalty fees may be revised and redrawn by the Governor in Council after an investigation if the Governor finds the fees excessive.

No action will be permitted to collect fees in excess of the statements of fees filed or the fees allowed by the Governor in Council.

The Performing Rights Society protested the passage of the Amendment on the ground that it was contra to the provision of the Berne Convention. The protest was of no avail since under the Convention (article 4, Subdivision 2) the extent of the protection is governed exclusively by the law of the Country (in this case Canada) where protection is claimed. This amendment follows the plan outlined by the British Board of Trade in its Report of the Departmental Committee in International Copyright is-

sued in 1935 for use at the proposed Berne Convention to be held at Brussels in 1935 (the plan is discussed under "Berne Convention" supra).

## (C) England

### 1. Action by the United States.

The works of alien authors not resident in the United States, were not protected under our Copyright Laws until the passage of the Chase Copyright Law on March 3, 1891.

The first Copyright Act passed in the United States, on May 31, 1790 granted protection *only to the works of an author who was a citizen of the United States "or a resident within the same"*. This restriction was continued for over one hundred years in the three general revisions of our Copyright Act made between May 31, 1790 and March 3, 1891; it was omitted from the Chase Act passed on March 3, 1891.

The first Copyright Act expressly permitted the piracy of the works of alien authors; Section 5 of the Act provided:

"Nothing in this Act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States of any map, chart, book or books, written, printed or published by any person not a citizen of the United States in foreign parts or places without the jurisdiction of the United States."

This clause was incorporated in substantially the same form in the General Revisions of the Copyright Acts of 1831, 1870 and 1873.

In the desire for International Copyright two methods of approach were adopted; one by treaty between England and the United States and the other by amending our Copyright Law to extend its benefits to the works of alien authors.



## 2. The efforts of Senator Henry Clay.

On February 16, 1837, Senator Henry Clay, acting upon a petition dated February 2, 1837 and signed by 56 eminent British authors introduced a bill (S. 32) in the United States Senate extending the benefits of our Copyright Act to the subjects of the United Kingdom of Great Britain, Ireland and France "in the same manner as if they were residents and citizens of the United States."

This privilege, however, was conditioned upon the simultaneous reprinting of the books of foreign authors in the United States. This is the first use of the manufacturer's clause in copyright legislation in the United States.

Senator Clay's Bill aroused little or no enthusiasm; he introduced the Bills in the Senate as follows:

December 13, 1837—designated as S. 32

December 17, 1838—designated as S. 75

January 6, 1840—designated as S. 129

January 6, 1842—designated as S. 115

Finally on May 12, 1842, the Senate Committee reported adversely on the last bill he introduced.

On February 7, 1873, Senator Morill reported unfavorably on the Appleton and the American Copyright Association bills and on international copyright relations generally and said:

"In view of the whole case, your committee are satisfied that no form of international copyright can fairly be urged upon Congress upon reasons of general equity, or of constitutional law; that the adoption of any plan for the purpose which has been laid before us would be of very doubtful advantage to American authors as a class, and would be not only an unquestionable and permanent injury to the manufacturing interests concerned in producing books, but a hindrance to the diffusion of knowledge among the people, and to the cause of universal education \* \* \*."

The Chace Copyright Law was passed March 3, 1891; it became effective July 1, 1891.

The Law contained the manufacturing clause as follows:

"That in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited, as above, shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom."

The Law also provided that the importation in the United States of any article not so made "shall be and is hereby prohibited".

### 3. By Treaty.

#### (a) The Lord Palmerton Treaty

After extensive negotiations, a treaty was actually concluded between England and the United States on February 17, 1853. On the next day (February 18, 1853), the President of the United States sent it to the Senate for ratification. It was referred to the Attorney General of the United States who rendered his opinion on it one year thereafter, February 16, 1854. On that date, Caleb Cushing, the Attorney General, sent an opinion to Mr. William L. Marcy, Secretary of State, stating that the treaty would supersede any copyright act then on the statute books. A storm of protest from the American publishers and the book craft industry killed the treaty.

#### (b) Lord Clarendon Treaty

In 1870, Lord Clarendon proposed a draft of a treaty between the United States and Great Britain. A manufacturing clause provided that the author of the work

should not be entitled to copyright unless such work was manufactured and published in the United States by a citizen of the United States within three months after its original publication in the country of the author or proprietor. The treaty died of inertia.

On November 25, 1878, a draft of a treaty between the two countries was made by Harper & Brothers, the publishers, and was known as The Publishers' Copyright Convention. The proposed treaty was freely and severely criticized in the public press; activities in favor of the treaty were discontinued.

The difficulties in negotiating a convention or treaty were set forth by Frederick T. Frelinghuysen, Secretary of State, in the following words:

"The difficulty in the way of negotiating a formal copyright treaty with any foreign country is that the copyright laws of the two countries are usually so different that a detailed reciprocal code cannot be agreed on. Such a codified treaty necessarily puts the foreign author on a different footing from the home author, more privileges in some things it may be, and less so in others . . . . I am satisfied that a simpler solution of the question could be effected by some means which will give in each country to the foreign author the same right as a native author enjoys".

A Copyright treaty between the United States and England has never been concluded.

#### **4. Copyright protection in England on works of American authors prior to July 1, 1912.**

(1) The International Copyright Acts of England (1838, 1844, 1886) referred only to works of alien authors first published abroad and did not affect the rights of an alien under the general copyright statutes. The doctrine that an alien, including a citizen of the United States, was capable of acquiring British copyright by first publishing



in England was never questioned until 1849. Before that year, protection of the English Law had been uniformly extended to the works of foreign authors published for the first time in England.

The question was discussed with conflicting opinions in the following cases:

- (a) D'Almaine vs. Boosey, 1835 (1 Young & Colliers Reports, Exchequer Equity 288);
- (b) Bentley vs. Foster, 1839 (10 Simons Reports Chancery 329);
- (c) Chappel vs. Purday, 1845 (14 Messon & Wellsbury Reports Exchequer 303);
- (d) Cocks vs. Purdy, 1848 (5 Common Bench Reports 860);
- (e) Boosey vs. Davidson 1849 (13 Queen's Bench Reports 257);
- (f) Boosey vs. Purday 1849 (4 Exchequer Reports 145).

(2) Jeffreys vs. Boosey. House of Lords 1854 (4 House of Lords cases 815-896).

The question was finally passed upon by the House of Lords, in the case of Jeffreys v. Boosey, in 1854. In February 1831, Vincenzo Bellini, a citizen of Italy and residing at Milan, wrote an opera entitled "LA SONNAMBULA". On February 19, 1831, Bellini assigned the copyright in the opera to Giovanni Ricordi, also a citizen of Italy and a resident of Milan. On June 9, 1831, Ricordi was in London, England, and on that date, assigned the copyright in the opera to Jeffreys for publication in the United Kingdom. The plaintiff, Jeffreys, was a native born citizen of England and resided in England. He published the opera in London on June 10, 1831 and complied with all the formalities of the British Copyright Act.

The defendant thereafter published the opera claiming that it was in the public domain and that the plaintiff and his predecessors in title did not get valid copyright.

The case takes up 181 printed pages in the House of Lords reports. The principles of law involved were ably and exhaustively discussed. The case is one of the landmarks in English Copyright Law litigation. On appeal to the judges of the Court of Exchequer Chamber on May 30, 1851, the decision of the lower court was reversed. The case was then brought to the House of Lords. Six of the eleven judges held that a foreigner could obtain copyright by first publishing in England; five judges held that they could not. The House of Lords decided that English copyright would not vest in the work first published in England of a foreign author resident abroad at the time of publication.

(3) Routledge vs. Low 1868. 3 House of Lords 100.

The doctrine in *Jeffreys v. Boosey* was modified in 1868 in the case of *Routledge v. Low*. The Court held in the *Low* case that an alien became entitled to English copyright by first publishing in the United Kingdom, provided, he was anywhere within the British Dominions at the time of such publication.

In that case, Maria Suzanne Cummins, an American citizen and residing in the United States wrote a story entitled "Haunted Hearts". In April 1864 she sent the manuscript of her story to the Publishing House of Low, London, England for publication. By arrangement with her publisher, however, she went to Montreal Canada for a few days and while staying in Montreal, Low published the book in London on May 23, 1864. Thus the author had a residence in Montreal for a short period prior to, during and after the publication date of her book in London. Copyright in the work was assigned by Miss Cummins to Low and registration in his name was made in Stationers' Hall.

Low published the work in two volumes, sale price 16s. Routledge published the work in one volume; sale price 2s. Low instituted action against Routledge. Routledge interposed the defense that the author was an American citizen and not residing in the United Kingdom (England, Wales, Scotland and Ireland) on the day the work was published in London and that Low could not have

“Copyright in a work written by an alien between whose country and our own no longer International Copyright subsists”.

The Court held that residence any place within the British Dominions on the date of first publication was sufficient.

“British Dominions” was defined in the Law of July 1, 1842 (5 and 6 Victoria, Chapter 45, Section 2): “All parts of the United Kingdom of Great Britain and Ireland, the Island of Jersey and Gurnsey, all parts of the East and West Indies and all the colonies, settlements and possessions of the Crown which now are or hereafter may be acquired”. “United Kingdom” embraced England, Wales, Scotland and Ireland.

After this decision, it became the practice of English publishers of the works of American authors to insert in the publication contract a provision that the author on the date of publication would be somewhere in the British Dominions. For example, the contract dated October 18, 1873 between Samuel Langhorne Clemens (Mark Twain) and George Routledge & Sons, a London publishing house, for “The Gilded Age”, contains the following paragraph:

“In order to secure such copyright to the said George Routledge and Sons the said Samuel Langhorne Clemens and Charles Dudley Warner shall arrange with them on what day the said work shall be first published in England and three days before such day shall go to and from thence until four days after such day shall reside in some part of the



Dominion of Canada or some other parts of the British Empire to be previously agreed upon by the parties hereto. Immediately after the publication of the said work the said Samuel Langhorne Clemens and Charles Dudley Warner shall make a solemn declaration before some competent authority of the fact of their having so resided during such seven days in the Dominion of Canada or such other part of the British Empire as aforesaid and shall forthwith sign and forward to the said George Routledge and Sons the documents necessary to procure the entry of their names as proprietors of the copyright in the said work in the books kept at Stationers' Hall in the City of London and for assigning their copyright therein to the said George Routledge and Sons pursuant to the thirteenth section of the 5 and 6 Vic. Chap. 45".

While it was only necessary for the House of Lords in the case of *Low vs. Routledge* to decide that Low had valid Copyright in the work of Miss Cummins because she was on British soil on the date of publication, nevertheless the Lord Chancellor (Lord Cairns) and Lord Westbury expressed the view that actual residence in the British Empire was not necessary and that a foreign author residing outside the British Empire could acquire valid Copyright in Great Britain by first publishing in the United Kingdom.

However, without a court decision to support it, the views expressed by the Lord Chancellor Cairns and Lord Westbury that any person, whether a native or an alien, *can obtain copyright throughout the British Dominions* by the mere fact of first publication there, became the accepted law of England; first publication within the United Kingdom gave protection over the whole British Dominions. The residence of the author was of no importance, the vital fact being whether or not the work was first published within the British Dominions. Public opinion overruled a decision of The House of Lords without the formality of a Court proceedings.

After the United States passed the Chace Act on March 3, 1891, Great Britain applied on behalf of its subjects for the benefits of the Act.

On June 20, 1891 our ambassador to England notified our State Department that Lord Salisbury had certified to the United States that:

"Her Majesty's Government are advised that under existing English law an alien by first publication in any part of Her Majesty's dominions can obtain the benefit of English copyright, and that contemporaneous publication in a foreign country does not prevent the author from obtaining English copyright; that residence in some part of Her Majesty's dominions is not a necessary condition to an alien obtaining copyright under the English copyright law; and that the law of copyright in force in all British possessions permits to citizens of the United States of America the benefit of copyright on substantially the same basis as to British subjects".

"This assurance is understood to have been given by the Government in reliance on an opinion of the Law Officers that a citizen of the United States could obtain British copyright by publishing the work in the British Dominion, while residing in the United States. The Law Officers appear to have followed the opinions of Lord Cairns and Lord Westbury in *Routledge v. Low* (1868), L. R. 3 H. L. 100, disregarding the contrary opinions of Lords Cranworth and Chelmsford. As already stated, there has, however, been no formal decision of the English Courts to this effect . . ."

Upon these representations the President of the United States issued his Proclamation of July 1, 1891 extending to the works of British authors the benefits of the United States Copyright Act.

It is difficult to ascertain in what point of time the law as expressed by the English Law Officers became the law of England. Certainly for a long time after *Routledge v. Low* was decided, it was the prevailing opinion

that an American citizen had to be a resident of the Dominions on the date of publication.

In the case of *Falcon v. Famous Players Film Co. Ltd.* (Law Reports 1926, 2 Kings Bench 474, decided by the Court of Appeal, June 10, 1926) it was held that the views of the English Law Officer was the law of England in 1886.

William Gillette, an American citizen residing in the United States, wrote a play entitled "HELD BY THE ENEMY" in 1884 and 1885. The play was publicly performed in England at Ladbroke Hall, Nottingham, on Saturday, February 20, 1886, thus gaining first publication in England. At that time, under the law of England, a public performance of a play was a publication. Famous Players Film Co. Ltd. attempted to release a picture in England based upon this play. Falcon asserted his rights under an assignment of June 30, 1898. The defendant set up the defense that at the time the play was first performed (first published in England), it was not possible for the plaintiff, who was an alien author, to obtain copyright in England. The Court held, however, that an alien non-resident author could acquire performing rights by first public performance in England of his dramatic work and could acquire copyright by the first publication in England of his work as a book. The Court thus followed the opinions of Lords Cairns and Westbury in *Routledge v. Low*. MacGillivray stated October 10, 1930:

"Prior to the Copyright Act 1911 an American citizen could acquire copyright in the British Dominions by simultaneous publication of his work within the British Dominions although not himself either permanently or temporarily resident in such dominions. The doubt on this point was set at rest by the decision of the Court of Appeals in *Falcon v. Famous Players* (1926) 2 K. B. 493. Since the Copyright Act 1911 the law is the same except that 14 days grace is now allowed and copyright is secured if the work is published in the British dominions within 14 days of its first publication in America. Simultaneously publication similarly



secures copyright in the foreign countries party to the Berne Convention.

Simultaneously publication was effective even before 1891. Indeed it was because the law officers of the Crown were then able to advise the foreign secretary (Lord Salisbury) that an American citizen could obtain protection by simultaneous publication of his work in this country that the United States admitted the works of British subjects to the benefit of the Chase Act \* \* \*."

In England prior to July 1, 1912 a public performance of a play was a publication and was entered at Stationers' Hall; under the Copyright Act of 1911 a public performance is not a publication.

In the United States, a public performance of a play was and is not a publication. A public performance does not destroy the Common Law copyright in the play.

See: *Ferris vs. Frohman*

(Decided February 19, 1912)

223 U. S. Reports 424

*Palmer vs. Dewitt*

(Decided February 27, 1872)

47 New York 532

Before July 1, 1912, in order not to have their plays thrown into the public domain, authors and producers of American plays arranged to have their plays performed (read) in the British Kingdom on the same night or on the same day it was performed in the United States. There were service bureaus that took care of these performances and reading; for a stipulated sum an English service bureau, usually an individual, would arrange to have the play read in London by himself—sometimes with 1 or 2 assistants—before an audience consisting of a few selected people usually hired by the agent. This was called a performance and was duly noted as such in the Official Public Records. Sometimes this was done by an agent in the British West Indies or in Canada.

## 5. Copyright protection in England on works of American authors under the English Copyright Law of 1911.

(a) Under the Copyright Act of 1911, passed December 16, 1911, effective July 1, 1912, Copyright is granted:

"Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if

(a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and

(b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid, but in no other works."

First or simultaneous publication is described in Section 35, subdivision (3) of the Act as follows:

"For the purposes of this Act, a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of His Majesty's dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days, or such longer period as may, for the time being, be fixed by Order in Council."

Unpublished works of American authors are protected in England under the Order in Council of February 3, 1915; the Order provides:

“1. The Copyright Act, 1911, including the provisions as to existing works, shall, subject to the provisions of the said Act and of this Order, apply—

(a) to literary, dramatic, musical and artistic works the authors whereof were at the time of the making of the works citizens of the United States of America, in like manner as if the authors had been British subjects.

(b) in respect of residence in the United States of America, in like manner as if such residence had been residence in the parts of his Majesty's dominions to which the said Act extends.

Provided that—

(1) The term of copyright within the parts of His Majesty's dominions to which this Order applies shall not exceed that conferred by the law of the United States of America.

(2) The enjoyment of the rights conferred by this Order shall be subject to the accomplishment of the conditions and formalities prescribed by the law of the United States of America.

(3) In the application to existing works of the provisions of Section 24 of the Copyright Act, 1911, the commencement of this Order shall be substituted for the 26th July, 1910, in sub-section 1 (b).

2. This order shall apply to all His Majesty's Dominions, Colonies and Possessions, with the exception of those hereinafter named, that is to say:

The Dominion of Canada  
 The Commonwealth of Australia  
 The Dominion of New Zealand  
 The Union of South Africa  
 Newfoundland”

Section 24 (1) (b) of the English Copyright Act, referred to in paragraph (3) of the Order in Council provides:



"Where any person has, before the twenty-sixth day of July, nineteen hundred and ten, taken any action whereby he has incurred any expenditure or liability in connection with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interest arising from or in connection with such action which are subsisting and valuable at the said date, unless the person who by virtue of this section, becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration (p. 249)."

The Order in Council was interpreted by Lord Balfour, Foreign Secretary (1916-1918) May 17, 1918 in a letter to the American Ambassador at London, as follows:

"With reference to your note No. 411 of March 20th, I have the honour to state that the object of the Order in Council of the 3rd February, 1915, was to provide protection within the Dominions to which the British Copyright Act extends for the unpublished works of citizens of the United States of America, and by the issue of such order, to obtain from the Government of the United States of America protection against reproduction by means of mechanical contrivances for the works of British subjects.

2. The operative part of the Order accordingly places American authors upon the same footing as British authors in respect of unpublished works, subject to certain conditions.

3. In the case of published works, the copyright conferred by the British Act is dependent upon the place of publication of the work and not upon the nationality of the author; and the Order in Council contains no provision making first publication in

the United States equivalent to first publication in the parts of His Majesty's Dominions to which the Act extends. \* \* \* American authors, therefore, can still only obtain protection in this country for their published works by first (or simultaneous) publication in the parts of His Majesty's Dominions to which the Act extends, or in Allied or neutral countries belonging to the International Copyright Union under the provisions of the Order in Council under the Copyright Act relating to the foreign countries of the Union. Further, the publishers of books by American authors published in the United Kingdom must still comply with the requirements of Section 15 of the Act as to deposit of copies in certain libraries \* \* \*."

Since there is no common law copyright in the United States (as distinct from the several states that make the Union) the unpublished works protected in England under the Order in Council must be those specified in Section 11 of the United States Copyright Act (works of an author of which copies are not reproduced for sale).

Section 11 reads:

"That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this Act, where the work is later reproduced in copies for sale".

An unpublished story or novel cannot be registered under Section 11. The term of copyright, although not mentioned in Section 11, was fixed by the courts as twenty-eight (28) years from the date of the deposit of the work; the section has been held constitutional. See:

*United States vs. Marx* (Decided April 12, 1938) 96 Federal Reporter 2nd Series 204.

The works of American authors are protected in England.

1. *Published works*—for a term of 50 years after the death of the author.

(a) if published simultaneously in England with publication in the United States; simultaneous publication means fourteen (14) days after the publication in the United States.

(b) if published simultaneously in any Berne Convention country; publication in the Berne Convention country must be upon the same day as publication in the United States.

In an earlier English case, where the work was published in Berlin on a certain day at a certain hour and in England on the same day at the same hour, but not at the exact time of publication in Berlin, the difference in time was discussed as having an effect on the publication. The court indicated that if the work was published at two o'clock on a day certain in Berlin, it must be published at the same exact time in England, regardless of the hour shown on the clock in England.

## 2. *Unpublished works.*

Certain unpublished works of American authors are protected in England under the Order in Council of February 3, 1915. The term of copyright shall not exceed that conferred by the law of the United States of America.



This is subject to the accomplishment of the conditions and formalities prescribed by the law of the United States of America.

The works so protected are mentioned in Section 11 of the American Copyright Act as follows:

1. Lecture or similar production
2. Dramatic musical or dramatico-musical composition
3. Motion picture
4. Photograph
5. Work of art
6. Plastic work
7. Drawing

### III. PAN-AMERICAN COPYRIGHT CONVENTIONS.

#### 1. The Montevideo Convention.

Adopted January 11, 1889

Signatory countries:

#### SOUTH AMERICA

*Argentina*—ratified by Law No. 3192 of December 11, 1894; date of deposit not available.

*Bolivia*—ratified but no date available.

*Brazil*—did not ratify.

*Chile*—did not ratify.

*Paraguay*—ratified September 3, 1899; date of deposit not available.

*Peru*—ratified November 4, 1889; date of deposit not available.

*Uruguay*—ratified October 1, 1892; date of deposit not available.

#### EUROPEAN COUNTRIES

*France*—adhered by note of French Minister to Minister of Foreign Affairs of Argentina, February 26, 1896. Adhesion accepted by Argentina by Presidential Decree of May 3, 1896.

*Spain*—adhered by note of Spanish Minister to Minister of Foreign Affairs of Argentina, December 29, 1899. Adhesion accepted by Argentina by Presidential Decree of January 30, 1900.

*Italy*—adhered by note of Italian Minister to Minister of Foreign Affairs of Argentina, April 7, 1900. Adhesion accepted by Argentina by Presidential Decree of April 18, 1900.

*Belgium*—adhered by note from the Belgium Minister at Buenos Aires to the Argentine Minister of Foreign Affairs, dated May 18, 1903. Adhesion accepted by Argentina by Presidential Decree of June 1, 1903.

*Germany*—adhered by note from the German Minister at Montevideo to the Government of Uruguay, dated August 31, 1927. There is no record, however, of the acceptance of this adherence. In 1928, there was an exchange of notes between the German Legation at Buenos Aires and the Minister of Foreign Affairs, which indicates that the German adherence had been accepted by Argentina.

*The United States is not a member of this Convention but has copyright relations with some of the countries that are members of this Union.*

The adherence of France, Spain, Italy and Belgium has been accepted by Argentina and Paraguay; the Convention is reciprocally in force between these countries.

The adherence of Germany has been accepted by Argentina, Paraguay and Bolivia and the Convention is reciprocally in force between these countries.

The adherence of Austria has been accepted by Argentina alone and the convention is reciprocally in force between Argentina and Austria.

Under the terms of the Convention, any country may announce its adherence thereto but such adherence is binding only on those signatory countries which accept the same.

By the rules and regulations of Montevideo, and in accordance with the legal provisions of the Additional Protocol, it is necessary that the accessions of other countries be accepted by the countries which concluded the treaty.

The Convention provides:

*"ARTICLE 1. Union to protect literary and artistic property.—*The contracting States promise to recognise and protect the rights of literary and artistic property, according to the provisions of the present treaty.

*"ARTICLE 2. Authors shall enjoy rights secured in country of origin.—*The author of any literary or artistic work, and his successors, shall enjoy in the contracting States the rights accorded him by the law of the State in which its original publication or production took place.

*"ARTICLE 3. Definition of copyright.—*The author's right of ownership in a literary or artistic work shall comprise the right to dispose of it, to publish it, to convey it to another, to translate it or to authorise its translation, and to reproduce it in any form whatsoever.

*"ARTICLE 4. Term not to exceed that of country of origin.—*No State shall be obliged to recognise the right to literary or artistic property for a longer period than that allowed to authors who obtain the same right in that State. This period may be lim-



ited to that prescribed in the country where it originates, if such period be the shorter.

\* \* \* \* \*

"ARTICLE 11. *Each Government to exercise supervision.*—Those who usurp the right of literary or artistic property shall be brought before the courts and tried according to the laws of the country in which the fraud may have been committed."

## 2. The Mexico City Convention.

(Signed at Mexico, January 27, 1902)

Signatory countries:

Argentina	Honduras
Bolivia	Mexico
Chile	Nicaragua
Colombia	Peru
Costa Rica	Paraguay
Dominican Republic	Salvador
Ecuador	United States
Guatemala	Uruguay
Haiti	

It was ratified by and is now in effect in the following countries:

*Costa Rica*—June 28, 1903, ratification deposited August 10, 1903.

*Dominican Republic*—April 24, 1902, ratification deposited May 23, 1907.

*Guatemala*—April 25, 1902, ratification deposited August 6, 1902.

*Honduras*—July 4, 1904, ratification deposited August 5, 1904.

*Nicaragua*—August 13, 1904, ratification deposited October 31, 1904.

*Salvador*—May 16, 1902, ratification deposited July 4, 1902.

*United States*—March 16, 1908, ratification deposited March 31, 1908; proclaimed by the President of the United States April 9, 1908.

On the same day (January 27, 1902) the Mexico City Convention adopted a treaty on patents of invention, industrial drawings, models and trademarks.

The convention states:

“ARTICLE 4. In order to obtain the recognition of the copyright of a work, it is indispensable that the author or his assigns or legitimate representative, shall address a petition to the official department which each Government may designate, claiming the recognition of such right, which petition must be accompanied by two copies of his work, said copies to remain in the proper department.

If the author or his assigns should desire that this copyright be recognized in any other of the signatory countries, he shall attach to his petition a number of copies of his work equal to that of the countries he may therein designate. The said department shall distribute the copies mentioned among those countries, accompanied by a copy of the respective certificate, in order that the copyright of the author may be recognized by them.

\* \* \* \* \*

“ARTICLE 5. The authors who belong to one of the signatory countries, or their assigns, shall enjoy in the other countries the rights which their respective laws at present grant, or in the future may grant, to their own citizens, but such right shall not exceed the term of protection granted in the country of its origin.

\* \* \* \* \*

“ARTICLE 13. All fraudulent works shall be liable to sequestration in the signatory countries in which the original work may have the right of legal protection, without prejudice to the indemnity

or punishments to which the falsifiers may be liable according to the laws of the country in which the fraud has been committed."

### 3. The Rio De Janeiro Convention.

(Signed at Rio de Janeiro, August 23, 1906)

A convention on patents of Inventions, Drawings and Industrial Models, Trade-Marks and Literary and Artistic Property.

Signatory countries:

Argentine	Guatemala
Bolivia	Honduras
Chile	Mexico
Columbia	Nicaragua
Costa Rica	Panama
Cuba	Paraguay
Dominican Republic	Peru
Ecuador	United States of America
El Salvador	Uruguay

The following countries have ratified the convention:

*Chile*—ratified July 2, 1909; ratification deposited June 28, 1910.

*Costa Rica*—ratified December 21, 1908; date of deposit of ratification not available.

*Guatemala*—ratified April 17, 1907; ratification deposited June 14, 1910.

*Honduras*—ratified February 5, 1907; ratification deposited October 16, 1908.

*Nicaragua*—date of ratification not available; ratification deposited August 25, 1909.

*Panama*—ratified January 17, 1911; ratification deposited May 22, 1911.



*Salvador*—ratified May 11, 1907; ratification deposited June 3, 1910.

*Ecuador, Brazil*—these countries are listed as having ratified the Convention but the dates of deposit and ratification are not available.

*United States of America*—Ratified March 1, 1907.

#### 4. Convention of Washington.

(Signed at Washington, December 20, 1907)

Signed and ratified by the following countries:

*Costa Rica*, February 25, 1908.

*Guatemala*, March 11, 1908.

*Honduras*, March 3, 1908.

*Nicaragua*, February 11, 1908.

*Salvador*, March 2, 1908.

The dates of deposit of these ratifications is not available.

This Convention is a part of a General Treaty of Peace and Amity between Costa Rica, Guatemala, Honduras, Nicaragua and Salvador which was concluded at the Central American Peace Conference, December 20, 1907.

This Convention was superseded by a Convention adopted at the Conference on Central American Affairs, held in Washington, February 7, 1923. It became effective on November 24, 1924. It was denounced by Costa Rica and Salvador, effective as of January 1, 1934. It is in force now between Guatemala, Honduras and Nicaragua.

#### 5. Buenos Aires Convention.

Signed at Buenos Aires, August 11, 1910; ratification advised by the Senate, February 15, 1911; ratified by the President, March 12, 1911; ratification of the United States deposited with the Government of the Argentine

Republic, May 1, 1911; proclaimed July 13, 1914. For discussion of this convention see *infra*.

## 6. Convention of Caracas.

(Signed at Caracas, July 17, 1911)

### *Signatory countries:*

*Bolivia*—no information available.

*Colombia*—no information available.

*Ecuador*—ratified and deposited; no date available.

*Peru*—ratified October 22, 1915; date of deposit not available.

*Venezuela*—ratification deposited December 19, 1914.

## 7. Convention at Havana.

(Signed at Havana, Feb. 20, 1928)

Sixth International Congress of American States, called to revise the Convention signed at Buenos Aires, August 11, 1910.

### Signatory countries:

Argentine	Honduras
Bolivia	Mexico
Brazil	Paraguay
Colombia	Peru
Cuba	Salvador
Chile	Uruguay
Dominican Republic	United States
Haiti	

It was ratified by the following countries:

*Colombia*—ratified April 22, 1938; deposit has not been made.

*Costa Rica*—ratified May 8, 1933; ratification deposited June 16, 1933.

*Ecuador*—dates not known, but deposited some time prior to September 2, 1936.

*Guatemala*—ratified May 20, 1931; ratification deposited May 3, 1932.

*Nicaragua*—ratified January 26, 1934; ratification deposited April 21, 1934.

*Panama*—ratified December 19, 1928; ratification deposited May 13, 1929.

*The United States has not ratified this Convention.*

#### **8. Montevideo—Uruguay Convention.**

Held at Montevideo, December 3-26, 1933. Seventh International Conference of American States on Inter-American Copyright Protection; it was not a convention.

#### **9. Conference of the Inter-American Bar Association.**

(Held at Mexico City, July 31-Aug. 8, 1944)

At this conference, a resolution was passed appointing a committee of five experts on copyright to draft "a universal copyright convention" for all the countries in North and South America; after this convention is adopted it is to form the basis of a worldwide universal copyright convention.

#### **BUENOS AIRES CONVENTION**

Signed at Buenos Aires, August 11, 1910; ratification advised by the Senate, February 15, 1911; ratified by the President, March 12, 1911; ratification of the United States deposited with the Government of the Argentine Republic, May 1, 1911; proclaimed July 13, 1914.



## Signatory countries:

Argentine	Haiti
Bolivia	Honduras
Brazil	Mexico
Chile	Nicaragua
Colombia	Panama
Costa Rica	Paraguay
Cuba	Peru
Dominican Republic	Salvador
Ecuador	United States
Guatemala	Uruguay
	Venezuela

It was ratified by the following countries:

*Brazil*—February 9, 1915; ratification deposited May 31, 1915.

*Colombia*—January 14, 1936; ratification deposited September 23, 1936.

*Costa Rica*—June 20, 1916; ratification deposited August 31, 1916.

*Dominican Republic*—April 18, 1912; ratification deposited July 31, 1912.

*Ecuador*—April 8, 1914; ratification deposited May 31, 1914.

*Guatemala*—May 10, 1912; ratification deposited December 28, 1912.

*Haiti*—October 8, 1918; ratification deposited August 27, 1919.

*Honduras*—October 16, 1913; ratification deposited January 27, 1914.

*Nicaragua*—March 12, 1913; ratification deposited September 15, 1913.

*Panama*—June 12, 1913; ratification deposited August 25, 1913.

*Paraguay*—May 29, 1917; ratification deposited June 20, 1917.

*Peru*—April 30, 1920; ratification deposited April 30, 1920.

For some years the Copyright Office had included Peru as one of the countries ratifying the Convention although it was later ascertained that the Peruvian government had not actually done so.

Recently the Copyright Office received information from the Department of State that the Convention had been ratified by Peru on July 4th, 1932, advising that the Peruvian government had informed the other signatory countries that the failure to ratify in 1920 was an error and that that government desired the ratification this year to be retroactive as of the year 1920 in which the Treaty was signed.

Inasmuch as the Treaty provides that it shall be operative between the signatory states ratifying same three months after they shall have communicated their ratification to the Argentine government, the express wish of Peru to have its ratification made retroactive can not, in all likelihood, be carried out.

*Uruguay*—August 7, 1919; ratification deposited September 17, 1919.

*United States*—May 2, 1911; ratification deposited May 31, 1911.

The ratification of the United States to the Buenos Aires Convention was deposited with the Government of the Argentine Republic on May 31, 1911 although not proclaimed until July 13th, 1914. The proclaiming of a treaty by making its terms known to the public is a mere formal-

ity and the date of ratification and deposit is the controlling one.

No explanation has been made for delaying the issuing of the Proclamation from May 31, 1911 (the date the ratification by the United States was deposited with the Argentine Government) to July 13, 1914.

Bolivia adhered to the Convention, subject to ratification, May 15, 1914, but no ratification has been deposited with the Argentine Government.

The Report of the Eighth International Conference of American States held at Lima, Peru, December 9-27, 1938, states (at page 65) that the Convention was ratified by sixteen (16) American Republics; the list shows that fourteen (14) republics (including Peru) have ratified the convention.

(a) The important articles of the Convention are:

"ARTICLE 1. The signatory States acknowledge and protect the rights of Literary and Artistic Property in conformity with the stipulations of the present Convention.

"ARTICLE 2. In the expression "Literary and Artistics works" are included books, writings, pamphlets of all kinds, whatever may be the subject of which they treat, and whatever the number of their pages; dramatic or dramatico-musical works; choreographic works; musical compositions with or without words; drawings, paintings, sculpture, engravings; photographic works; astronomical or geographical globes; plans, sketches or plastic works relating to geography, geology or topography, architecture or any other science; and, finally, *all productions that can be published by any means of impression or reproduction.*

"ARTICLE 3. *The acknowledgment of a copyright obtained in one State, in conformity with its laws, shall produce its effects of full right in all the other States without the necessity of complying with any other formality, provided always there shall appear*



*in the work a statement that indicates the reservation of the property right.*

"ARTICLE 4. The copyright of a literary or artistic work, includes for its author or assigns the exclusive power of disposing of the same, of publishing, assigning, translating, or authorizing its translation and *reproducing it in any form whether wholly or in part.*

"ARTICLE 6. The authors or their assigns, citizens or domiciled foreigners, shall enjoy in the signatory countries *the rights that the respective laws accord*, without those rights being allowed to exceed the term of protection granted in the country of origin.

"ARTICLE 7. The country of origin of a work will be deemed that of its first publication in America, and if it shall have appeared simultaneously in several of the signatory countries, that which fixes the shortest period of protection."

(b) *Portuondo vs. Columbia Phonograph Company and Pedro Flores*, United States District Court, Southern District of New York, May 13, 1917.

This is the only litigation that has been located, dealing with an interpretation of the Convention.

(c) **Facts of the Case.**

Porfirio Golibart, a citizen of the Dominican Republic, wrote a musical composition in 1928 entitled "Fellita" which he registered on August 6, 1928, in the office of the Secretary of State of the Public Education and Fine Arts of the Dominican Republic.

Thereafter, Porfirio Golibart assigned the composition to the plaintiff Juan Luis Portuondo.

In 1935, defendant Pedro Flores published a composition entitled "Carmelita"; this composition was apparently recorded by the Columbia Phonograph Company.

Plaintiff alleges that the composition "Carmelita" infringes the composition "Fellita".

The plaintiff claims copyright protection in the United States on the ground that the Dominican Republic is a member of the Buenos Aires Convention, August 11, 1910, and that the United States of America is a party to that Convention.

The defendant moved to dismiss the complaint on the ground—

(1) That the Buenos Aires Convention did not extend protection to mechanical reproduction.

(2) That the complaint did not allege that the statutory requirements of the copyright laws of the Dominican Republic were fully complied with.

(3) *That the complaint did not allege a reservation of the alleged property rights.*

(4) That a copy of the work was not attached to the complaint as required by Rule 2.

(d) The following is Portuondo's amended complaint:

"FIRST. That at all the times hereinafter mentioned plaintiff's assignor, PORFIRIO GOLIBART, was and still is a citizen of the Dominican Republic.

"SECOND. That the plaintiff is a resident of the City, County, and Southern District of New York.

"THIRD. Upon information and belief that the defendant, PEDROS FLORES, is a citizen and resident of the City, County, and Southern District of New York.

"FOURTH. That the defendant, COLUMBIA PHONOGRAPH COMPANY, INC., is a corporation organized under the laws of the State of New York, with its principal place for the transaction of business in the City, State, and Southern District of New York.

"FIFTH. That in 1928 plaintiff's assignor composed a musical composition entitled 'Fellita'; that

a copy of the said musical composition is annexed hereto as Exhibit A and made a part hereof.

"SIXTH. That on or about August 6th, 1928, plaintiff's assignor duly procured the said composition to be copyrighted in the office of the Secretary of State of the Public Education and Fine Arts of the Dominican Republic. A copy of the certificate of registration of said copyright, marked 'Exhibit B,' is attached hereto and made a part hereof; that all the steps required by the laws of the Dominican Republic in securing the copyright to the said song and registering claim thereto have been duly taken and that the statutory requirements have been duly complied with; that in the said song, as copyrighted and registered, there appeared a statement indicating the reservation of the property right.

"SEVENTH. That the United States of America and the Dominican Republic are parties to a Convention concerning Literary and Artistic Copyright signed at Buenos Aires, August 11th, 1910; that Article 2nd of the said Convention provides that musical compositions with or without words include all productions that can be published by any means of impression or reproduction; that the following countries are also parties to the said Convention: Argentine Republic, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay, and Venezuela.

"EIGHTH. That Article 3rd of the said convention provides:

'The acknowledgment of a copyright obtained in one State, in conformity with its laws, shall produce its effects of full right, in all the other States, without the necessity of complying with any other formality \* \* \*.'

"NINTH. That the defendants with full knowledge of the rights of plaintiff's assignor in said musical composition in or about 1935 and thereafter unlawfully published and caused to be published and placed on the market for sale in various stores



and elsewhere in the City of New York, United States of America and foreign countries, a musical composition 'Carmelita' and mechanical reproductions thereof; that said musical composition is taken and copied from 'Fellita,' the aforementioned composition of plaintiff's assignor.

"TENTH. That the said publication and sale by the defendants was and is without the consent and authority of the plaintiff or his assignor; that by reason of the foregoing wrongful acts of the defendants, the Plaintiff's assignor has suffered great damage. That the defendant PEDRO FLORES claims to be the composer of the said composition 'Carmelita' and has received and is receiving royalties and benefits for its use; that the said PEDRO FLORES has performed and is performing said composition over the radio and on phonograph records; that the defendant, COLUMBIA PHONOGRAPH COMPANY, INC., has manufactured and sold and is at present manufacturing and selling phonographic reproductions of the said composition in the City and State of New York, the United States of America, foreign countries and particularly through North America and South America, including those countries which are signatory to the convention above-mentioned.

"ELEVENTH. That the publication and sale of the said composition and mechanical reproductions thereof is in contravention of the rights of the plaintiff and his assignor and has caused and will cause irreparable damages for which he has no adequate remedy at law.

"TWELFTH. That prior to the commencement of this action PORFIRIO GOLIBART duly assigned to the plaintiff all his rights in the premises.

"THIRTEENTH. That the plaintiff's damages cannot be computed without an accounting.

"WHEREFORE, plaintiff demands judgment that the defendants, their agents, employees and all persons under their control be forever restrained and enjoined from manufacturing, publishing, selling or in any manner distributing the said musical com-

position entitled 'Carmelita' or any other composition which is a colorable imitation of any substantial part of the composition of plaintiff's assignor; that the defendants account to the plaintiff for any and all damages sustained by the plaintiff by reason of the acts aforesaid and that the defendants pay said damages to the plaintiff; that the defendants pay to the plaintiff the costs and disbursements of this action; and that the plaintiff have such other and further relief as may be proper."

On May 13, 1937, District Court Judge Coxe granted the motion of the defendant, Columbia Phonograph Company to dismiss the complaint.

Judge Coxe's opinion is reported in 36 U. S. Patents Quarterly 104; it reads as follows:

"The Buenos Aires copyright convention of 1910 (U. S. Stats., Vol. 38, p. 1785) provides in Article 6th that "authors or their assigns \* \* \* shall enjoy in the signatory countries the rights that the respective laws accord." The plaintiff, therefore, must look to our copyright laws for the enforcement of his rights in this country. Under Sections 1 (e) and 8 (b) of the Copyright Law (U. S. C. A. Title 17, Sec. 1, 8) protection against mechanical reproduction is denied unless substantially similar protection is accorded to United States citizens, and it is expressly provided that the existence of these reciprocal conditions shall be determined by the President "by proclamation made from time to time." In construing these sections, the Attorney General has ruled that here must be a separate proclamation of the existence of reciprocal conditions as to mechanical reproduction (29 op. Atty. Gen'l. p. 64). In the absence of such a proclamation, the plaintiff cannot avail himself of our copyright laws, and the complaint is fatally defective in not alleging affirmatively that a proclamation to that effect was made. This disposition makes it unnecessary to decide the other questions raised by the motion.

The motion of the defendant, Columbia Phonograph Company, Inc., to dismiss the amended complaint is granted."

It is to be noted that Judge Coxe did not dismiss the complaint because of a failure to allege that the song contained

“a statement that indicates the reservation of the property rights.”

It would appear that he learned Judge based his opinion on the theory of reciprocal copyright relations (between the Dominican Republic and the United States) on mechanical reproduction of music, and in the absence of a Presidential Proclamation (or the failure of the plaintiff to allege one) as required by section 8, subdivision (b) of the United States Copyright Act, dismissed the complaint.

In dismissing the complaint for the reasons stated in his opinion, we contend that the learned judge was clearly in error for the following reasons:

1. The Convention or Treaty is a self executed one; it needed no enabling legislation to put it in effect;

2. The ratification of the Convention or Treaty by the United States repealed any provisions of the statutes of the United States, including the United States Copyright Act, in conflict with the terms of the Convention;

3. The Convention was proclaimed by the President of the United States on July 13, 1914; another proclamation was unnecessary. As already noted, the ratification of the Convention by the United States was deposited on May 31, 1911 and became effective that day, without a Presidential Proclamation;

4. The plaintiff had exceedingly broad rights under Articles 1 and 4 of the Convention and could reproduce it (Article 4)

“in any form whether wholly or in part.”



In addition, he enjoyed (Article 6) in the signatory countries, the rights that the respective laws accord.

The Court should have enforced these rights.

However, it is conceded that the failure to include in the work a reservation of the property right, as required by Article 4 of the Convention, is fatal; that point was not discussed in the opinion and there is nothing to show whether or not the reservation was made in the work, except that the reservation is not mentioned in the amended complaint.

#### **IV. COPYRIGHT TREATIES BETWEEN THE UNITED STATES AND FOREIGN COUNTRIES.**

##### **1. China—United States.**

Signed at Shanghai, October 8, 1903. Ratified by Senate, December 18, 1903; ratified by President, January 12, 1904; ratified by China, January 10, 1904; ratifications exchanged at Washington, January 13, 1904. Proclaimed, January 13, 1904.

Article XI of the Treaty reads:

“Whereas the Government of the United States undertakes to give the benefits of its copyright laws to the citizens of any foreign State which gives to the citizens of the United States the benefits of copyright on an equal basis with its own citizens:—

“Therefore the Government of China, in order to secure such benefits in the United States for its subjects, now agrees to give full protection, in the same way and manner and subject to the same conditions upon which it agrees to protect trade-marks, to all citizens of the United States who are authors, designers or proprietors of any book, map, print or engraving especially prepared for the use and education of the Chinese people, or translation into Chinese of any book, in the exclusive right to print

and sell such book, map, print, engraving or translation in the Empire of China during ten years from the date of registration. With the exception of the books, maps, etc., specified above, which may not be reprinted in the same form, no work shall be entitled to copyright privileges under this article. It is understood that Chinese subjects shall be at liberty to make, print and sell original translations into Chinese of any works written or of maps compiled by a citizen of the United States. This article shall not be held to protect against due process of law any citizen of the United States or Chinese subject who may be author, proprietor or seller of any publication calculated to injure the well-being of China."

## **2. France—China—United States.**

Signed at Peking, December 26-27, 1911. Effective December 27, 1911.

Exchange of notes establishing arrangement between United States and France for reciprocal protection in China of literary and artistic property.

## **3. Hungary—United States.**

Signed at Budapest, January 30, 1912. Ratified September 16, 1912. Proclaimed October 15, 1912. Effective October 16, 1912.

Revived on May 27, 1922, by notice given by the United States in pursuance of Article 224 of the treaty of Trianon, concluded on June 4, 1920 (Treaties, etc., III, 3539), to the benefits of which the United States became entitled by the treaty of August 29, 1921, establishing friendly relations between the United States and Hungary.

The treaty of 1912 contains the following stipulations:

"ARTICLE 1. Authors who are citizens or subjects of one of the two countries or their assigns shall enjoy in the other country, for their literary, artistic, dramatic, musical and photographic works (whether unpublished or published in one of the two

countries) the same rights which the respective laws do now or may hereafter grant to natives.

The above provision includes the copyright control of mechanical musical reproductions.

"ARTICLE 2. The enjoyment and the exercise of the rights secured by the present Convention are subject to the performance of the conditions and formalities prescribed by the laws and regulations of the country where protection is claimed under the present Convention; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work.

"ARTICLE 3. The term of copyright protection granted by the present Convention shall be regulated by the law of the country where protection is claimed."

#### **4. Italy—United States.**

Signed at Washington, February 12, March 4, 11, 1915.  
Effective May 1, 1915.

Exchange of notes between Italy and United States relative to the enjoyment in Italy by citizens of the United States of rights similar to those granted under the United States Copyright Act of March 4, 1909.

#### **5. Japan—United States.**

Signed at Tokio November 10, 1905. Ratification advised by the Senate February 28, 1906. Ratified by the President March 7, 1906. Ratified by Japan April 28, 1906. Ratifications exchanged at Tokio May 10, 1906. Proclaimed May 17, 1906. Effective May 10, 1906.

The Treaty provides:

"ARTICLE I. The subjects or citizens of each of the two High Contracting Parties shall enjoy in the dominions of the other, the protection of copyright for their works of literature and art as well as photographs, against illegal reproduction, on the same basis on which protection is granted to the



subjects or citizens of the other, subject however to the provisions of Article II of the present Convention.

“ARTICLE II. The subjects or citizens of each of the two High Contracting Parties may without authorization translate books, pamphlets or any other writings, dramatic works, and musical compositions, published in the dominions of the other by the subjects or citizens of the latter, and print and publish such translations.”

#### 6. Japan—Korea—United States.

Signed at Washintgon, May 19, 1908. Ratified by Senate, May 20, 1908; ratified by President, June 2, 1908; ratified by Japan, August 3, 1908. Proclaimed August 11, 1908.

The Treaty provides:

“ARTICLE I. The Japanese Government shall cause to be enforced in Korea simultaneously with the operation of this convention, laws and regulations relative to inventions, designs, trade marks and copyrights similar to those which now exist in Japan.

“These laws and regulations are to be applicable to American citizens in Korea equally as to Japanese and Korean subjects. In case the existing laws and regulations of Japan referred to in the preceding paragraph shall hereafter be modified, those laws and regulations enforced in Korea shall also be modified according to the principle of such new legislation.

“ARTICLE II. The Government of the United States of America engages that in case of the infringement by American citizens of inventions, designs, trade marks or copyrights entitled to protection in Korea, such citizens shall in these respects be under the exclusive jurisdiction of the Japanese courts in Korea, the extraterritorial jurisdiction of the United States being waived in these particulars.

"ARTICLE III. Citizens of possessions belonging to the United States shall have in respect to the application of the present convention the same treatment as citizens of the United States.

"ARTICLE IV. Korean subjects shall enjoy in the United States the same protection as native citizens in regard to inventions, designs, trade marks and copyrights upon the fulfillment of the formalities prescribed by the laws and regulations of the United States.

"ARTICLE V. Inventions, designs, trade marks and copyrights duly patented or registered in Japan by citizens of the United States prior to the enforcement of the laws and regulations mentioned in Article I hereof shall without further procedure be entitled under the present convention to the same protection in Korea as is or may hereafter be there accorded to the same industrial and literary properties similarly patented or registered by Japanese or Korean subjects.

"Inventions, designs, trade marks and copyrights duly patented or registered in the United States by citizens or subjects of either High Contracting Party or by Korean subjects prior to the operation of the present convention shall similarly be entitled to patent or registration in Korea without the payment of any fees, provided that said inventions, designs, trade marks and copyrights are of such a character as to permit of their patent or registration under the laws and regulations above-mentioned and provided further that such patent or registration is effected within a period of one year after this convention comes into force.

"ARTICLE VI. The Japanese Government engages to extend to American citizens the same treatment in Korea in the matter of protection of their commercial names as they enjoy in the dominions and possessions of Japan under the convention for the protection of industrial property signed at Paris March 20, 1883."



## 7. Japan—China—United States.

Signed at Washington, May 19, 1908. Ratified by Senate, May 20, 1908; ratified by President, June 2, 1908; ratified by Japan, August 3, 1908. Proclaimed August 11, 1908.

The Treaty states:

“ARTICLE II. The citizens or subjects of each of the two High Contracting Parties shall enjoy in China the protection of copyright for their works of literature and art as well as photographs to the same extent as they are protected in the dominions and possessions of the other party.

“ARTICLE III. In case of infringement in China by a citizen or subject of one of the two High Contracting Parties of any invention, design, trade mark or copyright entitled to protection in virtue of this convention the aggrieved party shall have in the competent territorial or consular courts of such Contracting Party the same rights and remedies as citizens or subjects of such Contracting Party.

“ARTICLE IV. Each High Contracting Party engages to extend to the citizens or subjects of the other Contracting Party the same treatment in China in the matter of protection of their commercial names as they enjoy in the dominions and possessions of such Contracting Party under the convention for the protection of industrial property signed at Paris March 20, 1883.

“ARTICLE V. Citizens of possessions belonging to the United States and subjects of Korea shall have in China the same treatment under the present convention as citizens of the United States and subjects of Japan respectively.

“ARTICLE VI. All rights growing out of the present convention shall be recognized in the insular and other possessions and leased territories of the High Contracting Parties and all legal remedies provided for the protection of such rights shall be duly enforced by the competent courts.”



### 8. Siam—United States.

Signed at Washington, December 16, 1920. Ratified by Senate, April 27, 1921; ratified by Siam, April 29, 1921; ratified by President, May 6, 1921. Proclaimed October 12, 1921.

The Treaty provides:

"ARTICLE XII. The citizens or subjects of each of the High Contracting Parties shall enjoy in the territories and possessions of the other, upon fulfillment of the formalities prescribed by law, the same protection as native citizens or subjects, or the citizens or subjects of the nation most favored in these respects, in regard to patents, trade-marks, trade-names, designs and copyrights.

"ARTICLE XVII. The present Treaty shall come into effect on the date of the exchange of ratifications and shall remain in force for ten years from that date.

"In case neither of the High Contracting Parties should have notified twelve months before the expiration of the said ten years the intention of terminating it, it shall remain binding until the expiration of one year from the day on which either of the High Contracting Parties shall have denounced it."

### 9. Spain—United States.

(a) Copyright agreement effected by the exchange of notes between the United States and Spain.

Washington, D. C.; July 6-15, 1895. Establishes reciprocal copyright relations between the two countries. These relations were interrupted on April 21, 1898 by the war between the United States and Spain.

(b) Treaty of Peace between the United States and Spain.

Signed at Paris, December 10, 1898. Ratified by Senate, February 6, 1899; ratified by President, February 6, 1899;

